20-430

Jan. 29. 1874

Fields

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~132~~ ~~216~~ 30

THE UNITED STATES OF AMERICA, APPELLANTS,

vs.

THE STEAMER MONTELLO, HER BOATS, ETC., STEPHEN M. BOOTH AND CHARLES W. SLAYTON, CLAIMANTS.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WISCONSIN.

FILED OCTOBER 7, 1872.

SUPREME COURT OF THE UNITED STATES.

No. 432.

THE UNITED STATES OF AMERICA, APPELLANTS,

vs.

THE STEAMER MONTELLO, HER BOATS, ETC., STEPHEN M. BOOTH AND CHARLES W. SLAYTON, CLAIMANTS.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WISCONSIN.

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1 Circuit court of the United States of America for the eastern district of Wisconsin.

UNITED STATES OF AMERICA,
Eastern District of Wisconsin, ss:

At a stated term of the circuit court of the United States of America for the eastern district of Wisconsin, begun and held, according to law, at the city of Milwaukee, in said district, on the first Monday (being the first day) of January, A. D. 1872—present and presiding, the honorable Andrew G. Miller, district judge; Charles S. Hamilton, marshal; Edward Kurtz, clerk—among other the following proceedings were had, to wit:

2 THE UNITED STATES OF AMERICA
vs.
THE STEAMER MONTELLO, HER BOATS, TACKLE, apparel, & furniture—Stephen M. Booth & Charles W. Slayton, claimants. } Appeal in admiralty.

Be it remembered, that heretofore, to wit, on the 30th day of June, A. D. 1868, a certified copy of record on appeal of said cause from the district court of the United States for the district of Wisconsin was received from the clerk of said court, and filed in the clerk's office of this court as follows, to wit:

DISTRICT COURT RECORD.

District court of the United States of America for the district of Wisconsin.

UNITED STATES OF AMERICA,
District of Wisconsin, ss:

At a stated term of the district court of the United States of America for the district of Wisconsin, begun and held, according to law, at the city of Milwaukee, in said district of Wisconsin, on the second Monday (being the thirteenth day) of April, A. D. 1868—present, the honorable Andrew G. Miller, judge of said court, presiding; Cassius Fairchild, marshal; John M. Miller, clerk—among other the following proceedings were had, to wit:

THE UNITED STATES OF AMERICA
against
THE STEAMER MONTELLO, HER BOATS, TACKLE, apparel, and furniture—Stephen M. Booth, claimant. } In admiralty.

Be it remembered that, heretofore, to wit, on the twenty-eighth day of December, A. D. 1867, came the United States district attorney, Mr. Cogswell, and presented to the court a libel of information against the steamer Montello, her boats, tackle, apparel, and furniture, as follows:

Libel of information.

To the honorable Andrew G. Miller, judge of the district court of the United States for the district of Wisconsin:

3 The libel of information of J. B. D. Cogswell, attorney of the United States for the district of Wisconsin, who prosecutes for the

United States in this behalf, against the steamer Montello, her tackle, apparel, and furniture, in a cause of seizure, alleges and informs as follows:

That, on the 20th December, A. D. 1867, at Eureka, in said district, and on waters navigable, C. L. Sholes, esq'r, collector for the port of Milwaukee, seized said steamer, her tackle, apparel, and furniture, and now holds and has the same in his custody, as forfeited to the United States, for the causes hereinafter mentioned, to wit:

First. That, on the 1st day of October, A. D. 1867, the said steamer was used and employed in the transportation of passengers, and did carry passengers on the navigable waters of the United States, the hull of said steamer not having been inspected, pursuant to the provisions of the acts of Congress, at any time within twelve months prior to said first day of October. By reason whereof and by virtue of said acts of Congress, the owner or owners and master of the said steamboat, being a vessel propelled in whole or in part by steam, forfeited and became liable to pay to the said United States the sum of five hundred dollars, for the payment of which sum the said steamboat hath become liable to be seized and proceeded against summarily by way of libel, and for the recovery of which this civil and maritime cause is now instituted.

Second. That all and singular the premises are true, and within the admiralty & maritime jurisdiction of this court.

Wherefore the said attorney of the United States, on behalf of the said United States, prays the usual process and monition against the said steamboat, and her tackle, apparrel, and funiture, and that all persons interested therein may be cited to appear and answer the same, and that the court may be pleased to decree for the penalties aforesaid, and that the said steamboat may be condemned and sold to pay the several penalties aforesaid, with costs; and for such other relief as shall to law and justice appertain.

JNO. B. D. COGSWELL,
U. S. Attorney, Wis.

Order for process & advertisement.

Whereupon it is ordered by the court that process issue to the marshal, returnable on the eighteenth day of January next, at eleven o'clock in the forenoon, and that this court will on that day proceed to the trial and hearing thereof; and it is further ordered that notice be given by advertisement in the Daily Milwaukee News, a paper published in the city of Milwaukee, and by notices posted in the most public manner at and near the place of trial, for at least fourteen days.

Whereupon a monition issued as follows:

Monition.

DISTRICT OF WISCONSIN, *ss:*

The President of the United States of America to the marshal of the district of Wisconsin, greeting:

[SEAL.] Whereas a libel hath been filed in the district court of the United States for the district of Wisconsin, on the twenty-eighth day of December, in the year of our Lord one thousand eight hundred and sixty-seven, by the United States of America against the steamer Montello, her boats, tackle, apparel, and furniture

4 for the reason and cause in the said libel mentioned, and praying the usual process and monition of the said court in that behalf to be made, and that all persons interested in the said steamer or vessel, her tackle, &c., may be cited, in general and special, to answer the premises, and all proceedings being had that the said steamer or vessel, her tackle, &c., may, for the causes in the said libel mentioned, be condemned and sold to pay the demands of the libellant:

You are therefore hereby commanded to attach the said steamer or vessel, her tackle, &c., and to detain the same in your custody until the further order of the court respecting the same, and to give due notice to all persons claiming the same, or knowing or having anything to say why the same should not be condemned and sold pursuant to the prayer of the said libel, that they be and appear before the said court, to be held in and for the district of Wisconsin, on the 18th day of January next, at eleven o'clock in the forenoon of the same day, if the same shall be a day of jurisdiction, otherwise on the next day of jurisdiction thereafter, then and there to interpose a claim for the same, and to make their allegations in that behalf. And what you shall have done in the premises do you then and there make return thereof, together with this writ.

Witness the honorable Andrew G. Miller, judge of the district court of the United States for the district of Wisconsin, at the city of Milwaukee, in the said district, this twenty-eighth day of December, in the year of our Lord one thousand eight hundred and sixty-seven, and of our Independence the ninety-second.

J. M. MILLER, *Clerk*,
By E. KURTZ, *Deputy*.

JNO. B. D. COGSWELL,
U. S. Dist. Attorney.

Return.

Monition returned. In obedience to the within precept, I have, this 2nd day of January, 1868, attached the steamer Montello, her boats, tackle, apparel, and furniture, at Eureka, in this district, and have given due notice by advertisement in the Milwaukee News for fourteen days, and by posting notices, to all persons claiming the same, that this court will, on the eighteenth day of January next, at eleven o'clock in the forenoon of that day, if the same shall be a day of jurisdiction, otherwise on the first day of jurisdiction thereafter, proceed to the trial and condemnation thereof, unless a claim should be interposed for the same, and they make their allegations in that behalf.

CASSIUS FAIRCHILD, *Marshal*,
By JAMES A. BIGGERT, *Deputy*.

Fees.

Service	2 00
Travel	6 24
Proclamation	30
Custody	42 50
Printer	9 00
	$60 04

5 *Claim'ts stipulation.*

MARCH 27TH, 1868.—This day came Stephen M. Booth, as claimant of said steamer Montello, her boats, &c., and presented his stipulation, with William H. Wolf as surety, in the sum of two hundred and fifty dollars, as follows:

Stipulation.

District court of the United States for the district of Wisconsin, in admiralty.

Whereas a libel of information was filed on the twenty-eighth day of December, in the year of our Lord one thousand eight hundred and sixty-seven, by the United States of America, against the steamer Montello, her boats, &c., for the reasons and causes in the said libel mentioned:

And whereas the said steamer Montello, her boats, &c., is in the custody of the marshal, under the process issued in pursuance of the prayer of said libel, as appears from the monition now on file in said court:

Appearing personally Stephen M. Booth, as the claimant of the said steamer Montello, her boats, &c., and produced for surety William H. Wolf; and the said Stephen M. Booth & William H. Wolf, submitting themselves to the jurisdiction of the court, bound themselves, their heirs, executors, and administrators, in the sum of two hundred & fifty dollars, unto the said United States of America, that the said Stephen M. Booth & William H. Wolf shall abide and answer the decree of the said court in the aforesaid cause as to costs, and, unless they shall so do, they do hereby severally consent that execution shall issue forth against them, their heirs, executors, and administrators, goods and chattels, lands and tenements, wheresoever the same may be found, to the value of the sum above mentioned.

STEPHEN H. BOOTH.
W'M H. WOLF.

Taken and acknowledged this 27th day of March, 1868, before me.
J. M. MILLER,
U. S. Commissioner, Wisconsin.

DISTRICT OF WISCONSIN, *ss:*

William H. Wolf, party to the above stipulation, being duly sworn, deposes and says that he is worth the sum of two hundred and fifty dollars over and above all his just debts and liabilities.

W'M H. WOLF.

Sworn to this 27th day of March, 1868, before me.
J. M. MILLER,
U. S. Commissioner, Wisconsin.

And same day (March 27th, 1868) came the said claimants, by their proctors, Messrs. Hauser & Colman, and filed their claim as follows:

6 *Claim.*

To the honorable Andrew G. Miller, judge of the district court of the United States for the district of Wisconsin:

Stephen M. Booth, of Packwaukee, in the county of Marquette, and State of Wisconsin, and Charles W. Slayton, of Berlin, in the county of Green Lake, and State of Wisconsin, joint owners of the steamer Mon-

tello, her tackle, apparel, and furniture, intervening for their interests in the said steamer Montello, her tackle, apparel, and furniture, appear before this honorable court, and claim the said steamer, her tackle, apparel, and furniture, and state that they are the true and bona-fide owners thereof, and that no other person is the owner thereof.

And thereupon the said claimants pray that this honorable court will be pleased to decree a restitution of the same to them, and otherwise right and just to administer in the premises.

And the said Stephen M. Booth further makes affidavit that he is duly authorized by the said Charles W. Slayton to appear and make this claim in his name and stead.

S. M. BOOTH.

Sworn before me March 27, 1868.

J. M. MILLER,
U. S. Com'r, Wis.

HAUSER & COLMAN, *Proctors.*

And same day (March 27th, 1868) came the said claimants, by their proctors, and filed their exceptions to the libel of J. B. D. Cogswell, as follows:

Claimants' exceptions.

To the honorable Andrew G. Miller, judge of the district court of the United States for the district of Wisconsin:

The exceptions of Stephen M. Booth and Charles W. Slayton, respondents, to the libel of information of J. B. D. Cogswell, attorney of the United States for the district of Wisconsin, against the steamer Montello, allege that the said libel is informal and insufficient as follows:

First exception. That the same does not allege or specify on what waters navigable the said steamer was employed in carrying passengers.

Second exception. That the same does not allege or specify what acts of Congress, if any, have been violated.

Third exception. That the same does not show that the matters set forth are within the admiralty and maritime jurisdiction of this court.

Fourth exception. That this honorable court has no jurisdiction of the matters contained in the said libel, the same not being matters of admiralty and maritime jurisdiction, in that the said steamer Montello was, at the time of seizure, and at all other times, employed and used wholly on the inland waters of the State of Wisconsin, and none other, and was not engaged in the coasting trade, or foreign commerce, or any trade between different States of the United States.

In all of which particulars the said libel is irrelevant, informal, and insufficient.

HAUSER & COLMAN,
Proctors for Respondents.

J. H. HAUSER, *Advocate.*

7 APRIL 7TH, 1868.—This day came the attorney of the United States for the district of Wisconsin, Tho's Hood, esq'r, and filed amended libel of information, as follows:

Amended libel of information.

District court of the United States of America.

DISTRICT OF WISCONSIN, *ss:*

To the honorable Andrew G. Miller, judge of the district court of the United States for the district of Wisconsin:

John B. D. Cogswell, attorney of the United States for the district of Wisconsin, who prosecutes for said United States, exhibits this his amended libel of information against the vessel called and known as the steamer Montello, her boats, tackle, apparel, and furniture, engine, and boiler, and against all persons lawfully intervening for their interest therein.

And thereupon the said John B. D. Cogswell doth allege, articulately propound, and give the said judge to understand that, on the 20th day of December, A. D. 1867, at Eureka, in said district, and on waters navigable from the sea by vessels of ten tons or more burden, C. Latham Sholes, esq'r, collector of customs for the collection district of Milwaukee, did seize the aforesaid steamer, her boats, tackle, apparel, and furniture, engine and boiler, and now holds and has the same in his custody at the, and within the, district of Wisconsin, being the district within which the same was brought, as being forfeited to the United States, for the causes hereinafter stated, to wit:

First. For that heretofore, to wit, on the 1st day of October, A. D. 1867, the owner, master, or captain of the said vessel called the steamer "Montello," being a steamboat or vessel propelled in whole or in part by steam, and of twenty tons burden and upwards, did transport goods, wares, and merchandize, and passengers, in and upon the bays, lakes, rivers, and other navigable waters of the United States, and, having and carrying said passengers on board, did navigate the Fox River, between the ports and places of Oshkosh and Portage City, in said district, and prior to said seizure, to wit, at the time aforesaid, was and has been engaged in carrying and transporting cargoes of freight and merchandize, consisting of the products of the State of Wisconsin, destined for use and consumption in other States of the United States, and foreign countries; and also, that, prior to said seizure, said steamboat was and has been engaged in carrying cargoes of freight and merchandize, consisting of the products of other States of the United States, and transported therefrom to the State of Wisconsin, and destined to different points and ports within the said State of Wisconsin, without having complied with the conditions of an act of the Congress of the United States, approved July 7th, A. D. 1838, entitled "An act to provide for the better security of the lives of passengers on board of vessels propelled in whole or in part by steam," and without complying with the terms of an act entitled "An act to amend an act entitled 'An act to provide for the better security of the lives of passengers on board of vessels propelled in whole or in part by them,'" approved August 30th, A. D. 1852, in this, to wit, that said owner, master, or captain had not first obtained from the proper officer an enrolment and license under the existing laws, contrary to the statutes of the United States in such case made and provided; by reason whereof,

8 and by force of the said statutes, the owner or owners of said vessel forfeited and became liable to pay to the United States the sum of five hundred dollars, for the payment of which sum the said vessel became liable to be seized and proceeded against by way of

libel, and for the recovery of which this civil and maritime cause is now instituted.

Second. That, heretofore, to wit, on the 1st day of October, A. D. 1867, the said vessel called the steamer Montello, being a steamboat propelled in whole or in part by steam, and navigating the bays, inlets, rivers, harbors, and other waters of the United States, and not being a vessel subject to the jurisdiction of a foreign power, and engaged in foreign trade, but which said steamer was and is owned in whole by citizens of the United States, was navigated with passengers on board, upon the waters of the Fox River, between the places of Oshkosh and Portage City, in said district, an additional safety valve, of such dimensions and arrangement as has been theretofore prescribed by the board of supervising inspectors, not having been placed upon the boilers of said steamer, as provided by law, and no good and reliable water-guage having been provided for such boilers contrary to the statutes of the United States, by reason whereof and by force of the statutes, the owner or owners of said vessel forfeited and became liable to pay to the United States the sum of five hundred dollars, for the payment of which sum the said vessel became liable to be seized and proceeded against by way of libel, and for the recovery of which this civil and maritime cause is now instituted.

The said attorney of the United States, on behalf of the said United States, saith that all and singular the premises are true and within the admiralty and maritime jurisdiction of this honorable court. Wherefore he prays that process in due form of law may issue against the said vessel called the steamer Montello, her boiler, engine, boats, tackle, apparel, and furniture, to enforce the forfeiture thereof, and requiring notice to be given to all persons concerned in interest to appear and show cause on the return day of such process why such forfeiture should not be decreed.

JNO. B. D. COGSWELL,
Attorney of the United States for the District of Wisconsin.

MARCH 31, 1868.

And same day (April 7th, 1868) came the respondents, by their proctors, Messrs. Hauser & Colman, and filed their exceptions to the amended libel information as follows:

Exceptions to amended libel.

To the honorable Andrew G. Miller, judge of the district court of the United States for the district of Wisconsin:

The exceptions of Stephen M. Booth and Charles W. Slayton, respondents to the amended libel of information of J. B. D. Cogswell, attorney of the United States for the district of Wisconsin, against the steamer Montello, her boats, tackle, apparel, and furniture, engines, and boiler, allege that the said amended libel is informal, irrelevant, and insufficient, as follows, to wit:

First exception. That this honorable court has no jurisdiction of the matters contained in the first and second articles, or any articles, of the said amended libel, the same not being matters of admiralty and maritime jurisdiction, in that the said steamer Montello was employed and used wholly on the inland waters of the State of Wisconsin, and
9 none other, at the time of seizure, or at any other time, and was not engaged in the coasting trade, or foreign commerce, or in any trade or commerce between different States of the United States.

In all of which particulars the said amended libel is informal, irrelevant, and insufficient. Wherefore the respondents pray that the said libel and all proceedings, by the United States of America, against the steamer Montello, her boats, tackle, apparel, furniture, and engine, and boiler, be dismissed.

HAUSER & COLMAN,
Proctors for Respondents.

J. H. HAUSER, *Advocate.*

And now at this same term, to wit, April term, A. D. 1868, and on the first day thereof, to wit, on the 13th day of April, A. D. 1868, the following proceedings were had, to wit:

Decree.

UNITED STATES OF AMERICA
vs.
THE STEAMER MONTELLO, HER BOATS, &C.—STEPHEN M. BOOTH, respondent. } In admiralty.

This day came the district attorney, and came the respondent, by his advocates; and the exceptions of respondent to this information being argued, it is ordered by the court that said information be, and hereby is, dismissed, and that a warrant of restitution do issue.

A. G. MILLER.

Decree signed, recorded, & enrolled April 13th, 1868.

J. M. MILLER, *Clerk.*

Appeal.

And same day (April 13th, 1868,) came said district attorney in open court, and prayed an appeal to the circuit court of the United States for the district of Wisconsin; which appeal is allowed.

Warrant of restitution issued as follows:

Warrant of restitution.

DISTRICT OF WISCONSIN, *ss:*

[SEAL.] The President of the United States of America to the marshal of the district of Wisconsin, greeting:

Whereas a libel has been filed in the district court of the United States for the district of Wisconsin on the twenty-eighth day of December, in the year of our Lord one thousand eight hundred and sixty-seven, by the United States of America, against steamer Montello, her engines, machinery, boats, tackle, apparel, and furniture, praying that the same may be condemned as forfeited to the said libellant:

And whereas the said steamer Montello, her engines, &c., has been attached by the process of the said court in pursuance of the prayer of the libel, and is now in your custody in virtue of said process:

And whereas also a claim has been interposed and filed in said court by Stephen M. Booth, and such proceedings have been thereupon had that, by the sentence and decree of said court in this cause made and
10 pronounced on the 13th day of April, eighteen hundred and sixty seven, the said information being dismissed, the said steamer

Montello, her engines, &c., was adjudged to belong as claimed, and was ordered to be restored to the said claimant:

Therefore you, the said marshal, are hereby commanded to release the said steamer Montello, her engines, &c., from arrest, and to deliver and return the same unto the said Stephen M. Booth.

And what you have done in the premises do you make return thereof before the said court of admiralty forthwith, together with this writ.

Witness the honorable Andrew G. Miller, judge of the district court of the United States of America for the district of Wisconsin, at the city of Milwaukee, in said district, this 13th day of April, in the year of our Lord one thousand eight hundred and sixty-seven, and of the Independence of these United States the 92.

J. M. MILLER, *Clerk.*

Return.

In obedience to the within warrant, I have this 15th day of April, A. D. 1868, released the steamer Montello from arrest as commanded.

Service, $2.00.

CASSIUS FAIRCHILD,
U. S. Marshal.

UNITED STATES OF AMERICA,
District of Wisconsin, ss:

I, John M. Miller, clerk of the district court of the United States of America for the district of Wisconsin, do hereby certify that I have compared the writings annexed to this certificate, and they are true copies of their respective originals, and are correct transcripts therefrom, now on file and remaining of record in my office.

In testimony whereof I have hereunto set my hand and duly affixed the seal of the said court, at the city of Milwaukee, in the said district of Wisconsin, this twentieth day of April, in the year of our Lord one thousand eight hundred and sixty-eight, and of the Independence of the said United States the 92d.

[SEAL.] J. M. MILLER, *Clerk.*

End of record from district court.

And afterwards, to wit, at a stated term of the circuit court of the United States for the district of Wisconsin, begun and held, according to law, at the city of Milwaukee, in said district, on the second Monday (being the fourteenth day) of September, A. D. 1868, and on the eighth day thereof, to wit, on the 22nd day of September, A. D. 1868, the following proceedings were had, to wit:

Hearing in circuit court.

THE UNITED STATES OF AMERICA
vs.
THE STEAMER MONTELLO, HER BOATS, &C.—
Stephen M. Booth et al., claimants.
} Appeal in admiralty.

This day came the district attorney, and also the claimants, by their counsel, Mr. Hauser, and this cause came on to be heard before the honorable David Davis, associate justice of the Supreme Court

11 of the United States, assigned to this circuit, and the hearing being concluded, the same was held under advisement.

And now at this same term, to wit, September term, A. D. 1869, and on the seventh day thereof, to wit, on the 20th day of September, A. D. 1869, the following proceedings were had, to wit:

Decree.

THE UNITED STATES OF AMERICA
vs.
THE STEAMER MONTELLO, HER BOATS, &C.—
Stephen M. Booth et al., claimants.
} Appeal in admiralty.

This day came the district attorney, and the claimants, by their counsel; and, on consideration of this cause and the arguments of counsel, it is ordered by the honorable David Davis, associate justice of the Supreme Court of the United States, assigned to this circuit, that the decree of the district court dismissing the information herein be, and hereby is, affirmed.

And afterwards, to wit, on the 16th day of said term, to wit, on the 5th day of October, A. D. 1869, the following proceedings were had, to wit:

Appeal.

THE UNITED STATES OF AMERICA
vs.
THE STEAMER MONTELLO, HER BOATS, &C.,—
Stephen M. Booth et al., claimants.
} Appeal in admiralty.

This day came the district attorney and, in open court, prayed an appeal to the Supreme Court of the United States. Whereupon it is ordered by the court that said appeal be, and hereby is, allowed. Whereupon a citation issued.

The United States of America to Stephen M. Booth & Charles W. Slayton, claimants of the steamer Montello, her boats, &c., greeting:

You are hereby cited and admonished to be and appear at a
12 Supreme Court of the United States, to be holden at Washington on the first Monday of December next, pursuant to an appeal in the circuit court of the United States for the district of Wisconsin, wherein the United States of America is appellant and you are appellees, to show cause, if any there be, why the decree passed against the said United States of America should not be reversed, and speedy justice should not be done to the parties in that behalf.

Witness the honorable Salmon P. Chase, Chief Justice of the said Supreme Court of the United States, this fifth day of October, in the year of our Lord one thousand eight hundred and sixty-nine, and of our Independence the 94th.

A. G. MILLER,
District Judge U. S. for the Wisconsin District.

Served on the above-named Stephen M. Booth & Charles W. Slayton, by delivering a copy of this citation to J. H. Hauser, their proctor, this 22d day of November, A. D. 1869.

C. S. HAMILTON, *Marshal.*

Fees, $8.00.

(Indorsed:) U. S. circuit court Wisconsin. The United States vs. the steamer Montello. Citation.

13 NOVEMBER 26, 1869.—Certified copy of record forwarded per mail to the Supreme Court of the United States, Washington, D. C.

OCTOBER 2, 1871.—This day came the district attorney and presented to the court a mandate from the Supreme Court of the United States, as herein filed, to wit:

Mandate of Supreme Court.

UNITED STATES OF AMERICA, *ss.:*

[SEAL.] The President of the United States of America to the honorable the judges of the circuit court of the United States for the district of Wisconsin, greeting:

Whereas, lately, in the circuit court of the United States for the district of Wisconsin, before you or some of you, in a cause between The United States of America, libellant and appellant, and Stephen M. Booth and Charles W. Slayton, claimants of the steamer "Montello," her boats, tackle, apparel and furniture, respondents and appellees, wherein the decree of the said circuit court entered in said cause on the 20th day of September, A. D. 1869, is in the following words, viz:

"This day came the district attorney, and the claimants, by their counsel, and on consideration of this cause and the arguments of counsel, it is ordered by the honorable David Davis, associate justice of the Supreme Court of the United States assigned to this circuit,
14 that the decree of the district court dismissing the information herein be, and hereby is, affirmed."

As by the inspection of the transcript of the record of the said circuit court, which was brought into the Supreme Court of the United States by virtue of an appeal agreeably to the act of Congress in such case made and provided, fully and at large appears.

And whereas, in the present term of December, in the year of our Lord one thousand eight hundred and seventy, the said cause came on to be heard before the said Supreme Court, on the said transcript of the record, and was argued by counsel, on consideration whereof, it is now here ordered, adjudged and decreed by this court, that the decree of the said circuit court in this cause be, and the same is hereby, reversed. And it is further ordered that this cause be, and the same is hereby, remanded to the said circuit court for further proceedings to be had therein, in conformity with the opinion of this court.

You, therefore, are hereby commanded that such further proceedings be had in said cause, in conformity to the opinion & decree of this court, as according to right and justice and the laws of the United States ought to be had, the said appeal notwithstanding.

Witness the honorable Salmon P. Chase, Chief Justice of said
15 Supreme Court, the first Monday of December, in the year of our Lord one thousand eight hundred and seventy.

Costs of clerk ; attorney .
Taxed by—

D. W. MIDDLETON,
Clerk of the Supreme Court of the United States.

Order on filing mandate.

Whereupon it is ordered by this court that this cause be further proceeded in according to the opinion of the said Supreme Court.

And same day (October 2, 1871) came the district attorney, and filed his amended libel, as follows:

Amended libel of information.

Circuit court of the United States of America, eastern district of Wisconsin, *ss*:

To the honorable the judges of the circuit court of the United States for the eastern district of Wisconsin:

Levi Hubbell, attorney of the United States for the eastern district of Wisconsin, who prosecutes for said United States, exhibits this his amended libel of information against the vessel called and known as the steamer Montello, her boats, tackle, apparel and furniture, engine and boiler, and against all persons lawfully intervening for their interest therein, and thereupon the said attorney doth allege, articulately propound, and give the said judges to understand that, on the 20th day of December, A. D. 1867, at Eureka, in said district, and on waters navigable, to wit, on Fox River, which is a navigable stream of water running from Portage City by Eureka, in the State of Wisconsin,
16 into and through Lake Winnebago, and thence into and through Green Bay into Lake Michigan, and thus forming a continuous line of waters from Portage City to Lake Michigan for 240 miles or more; and thence to the sea, and being all the way navigable for vessels, measuring from 20 to 200 tons burthen, C. Latham Sholes, esq., collector of customs for the collection district of Milwaukee, did seize the aforesaid steamer, her boats, tackle, apparel and furniture, engine and boiler, and now holds and has the same in his custody, at and within the eastern district of Wisconsin, being the district within which the same was brought, as being forfeited to the United States for the causes hereinafter stated, to wit:

First. For that, heretofore, to wit, on the first day of October, A. D. 1867, the owner, master, or captain of the said vessel called the steamer Montello, being a steamboat or vessel propelled in whole or in part by steam, and of twenty tons burden and upwards, did transport goods, wares, and merchandise, and passengers in and upon the bays, lakes, rivers, and other navigable waters of the United States, and having and carrying said passengers on board, did navigate the Fox River between the ports and places of Oshkosh and Portage City in said district, and prior to said seizure, to wit, at the time aforesaid, was and has been engaged in carrying and transporting passengers, and also cargoes of freight and merchandise
17 consisting of the products the State of Wisconsin, destined for use and consumption in other States of the United States and foreign countries; and also, that prior to said seizure, said steamboat was and has been engaged in carrying passengers, and also cargoes of freight and merchandise, consisting of the products of other States of the United States, and transported therefrom to the State of Wisconsin, and destined to different points and ports within the said State of Wisconsin, without having complied with the conditions of an act of the Congress of the United States, approved July 7th, A. D. 1838, entitled "An act

to provide for the better security of the lives of passengers on board of vessels propelled in whole or in part by steam," and without complying with the terms of an act entitled "An act to amend an act entitled 'An act to provide for the better security of the lives of passengers on board of vessels propelled in whole or in part by steam,'" approved August 30th, A. D. 1852, in this, to wit: That said owner, master, or captain had not first obtained from the proper officer an enrollment and license under the existing laws, contrary to the statutes of the United States in such case made and provided; by reason whereof, and by force of the said statutes, the owner or owners of said vessel forfeited and became liable to pay to the United States the sum of five
18 hundred dollars, for the payment of which sum the said vessel became liable to be seized, and proceeded against by way of libel, and for the recovery of which this civil and maritime cause is now instituted.

Second. That heretofore, to wit, on the first day of October, A. D. 1867, the said vessel called the steamer Montello, being a steamboat propelled in whole or in part by steam, and navigating the bays, inlets, rivers, harbors, and other waters of the United States, and not being a vessel subject to the jurisdiction of a foreign power, and engaged in foreign trade, but which said steamer was and is owned in whole by citizens of the United States, was navigated with passengers on board upon the waters of the Fox River, between the places of Oshkosh and Portage City in said district, an additional safety-valve, of such dimensions and arrangement as had been prescribed by the board of supervising inspectors, not having been placed upon the boilers of said steamer as provided by law, and no good and reliable water-guage having been provided for such boilers, contrary to the statutes of the United States; by reason whereof, and by force of the statutes, the owner or owners of said vessel forfeited, and became liable to pay to the United States, the sum of five hundred dollars; for the payment
19 of which sum the said vessel became liable to be seized and proceeded against by way of libel, and for the recovery of which this civil and maritime cause is now instituted.

The said attorney of the United States, on behalf of the said United States, saith that all and singular the premises are true and within the admiralty and maritime jurisdiction of this honorable court; wherefore he prays that process in due form of law may issue against the said vessel called the steamer Montello, her boiler, engine, boats, tackle, apparel, and furniture, to enforce the forfeiture thereof, and requiring notice to be given to all persons concerned in interest, to appear and show cause, on the return day of such process, why such forfeiture should not be decreed.

LEVI HUBBELL,
U. S. Attorney Eastern Dist. Wisconsin.

JANUARY 6, 1872.—This day came Stephen M. Booth and Charles W. Slayton, claimants of the steamer Montello, by their attorney, Mr. J. H. Hauser, and filed their answer to the amended libel of information, as follows, to wit:

Answer to amended libel.

To the honorable judges of the circuit court of the United States for the eastern district of Wisconsin:

20 The answer of Stephen M. Booth, of Packwaukee, in Marquette County, and State of Wisconsin, and Charles W. Slayton, of Berlin, in the county of Green Lake and State of Wisconsin, owners and

claimants of the steamer Montello, to the amended libel of information of Levi Hubbell, United States district attorney for the eastern district of Wisconsin, against the steamer Montello, her tackle, apparel, and furniture:

First. The respondents, Stephen M. Booth and Charles W. Slayton, answering said libel, say that they are partners under the firm-name of Booth and Slayton, and as such partners, were at the time of the seizure of the said steamer Montello, and now are, the true and bona-fide owners of the said steamer Montello, her tackle, apparel, and furniture.

Second. That the allegations in the first part of the said libel are in great part falsely alleged, and that the truth is as follows:

The Fox River does not run to Portage City, but is connected with said city by a canal, and said canal is supplied with water from the Wisconsin River. That the said Fox River is not and never was a navigable stream of the United States. That prior to the year 1846, the said Fox River was not navigable for any kind of boats whatever, by reason of the shallow depth of the stream and the numerous rapids and abrupt falls.

21 That the United States, by an act of Congress, approved August 8, 1846, entitled "An act to grant a certain quantity of land to aid in the improvement of the Fox and Wisconsin Rivers, and to connect the same by a canal in the Territory of Wisconsin," ceded and granted to the Territory (now State) of Wisconsin exclusive control of the said Fox River, reserving only that it should be a public highway for the use of the Government of the United States, free from any tolls or charges whatever for the transportation of the mails, or for any property of the United States, or person in their service, passing up or along the same.

That the State of Wisconsin, by an act of the legislature, approved July 6, 1863, entitled "An act to incorporate an association for the improvement of the Fox and Wisconsin rivers," ceded and granted to the Fox and Wisconsin River Improvement Company all the rights and privileges which the State had obtained from the United States.

That the said Fox and Wisconsin Improvement Company, under and by virtue of the authority granted to it by the State of Wisconsin aforesaid, did build dams, locks, and canals, on the said Fox River, from Portage City to Green Bay, and that no boat, of whatever size, kind, or description, can now navigate the said Fox River without passing through the said locks and canals, and that the said Fox River is

22 a canal or slack-water navigation, and boats navigating the same are not within the admiralty and maritime jurisdiction of the United States, and that the said canal or slack-water improvement, together with locks and canals, and the entire control of the navigation of the said Fox River, belongs to the Green Bay and Mississippi Canal Company, and that the boats navigating the Fox River and passing through the locks and canals aforesaid have to pay toll to the said Green Bay and Mississippi Canal Company, and that the said steamer Montello, before the seizure, did so pay toll.

To the first article in said libel they deny that the steamer Montello, at the time of seizure, and before, was used in navigating the navigable waters of the United States; and further deny that this court has admiralty and maritime jurisdiction over the matters stated in said libel.

To the second article in said libel they deny that this court has admiralty and maritime jurisdiction stated in said libel; and further, that, on the 25th day of June, 1867, the said steamer Montello was duly inspected by W. Guthrie, U. S. inspector of hulls for the district of

Chicago and State of Illinois, and duly inspected by Thomas L. Humes, U. S. inspector of boilers for the district of Chicago and State of Illinois; and, on the eighth day of July, 1867, a certificate of inspec-
23 tion for one year, from the 25th day of June, 1867, subscribed and sworn to by each of said inspectors, was duly issued to the said steamer Montello, and that said inspectors' certificate has not been revoked nor cancelled by said inspectors, nor by any other person or authority, and that it has not been violated in any particular by the said steamer Montello, and that it remained in full force and effect on the said first day of October, 1867.

That the respondents deny that the said steamer Montello has become liable to pay the sum claimed in said libel or any part thereof, and that said steamer, her tackle, apparel and furniture, are in any manner liable to forfeiture therefor.

That all and singular the premises are true.

Wherefore, the respondents pray that this honorable court would be pleased to pronounce against the libel aforesaid, and to condemn the libellant in costs, and otherwise law and justice to administer in the premises.

HAUSER & COLMAN,
Proctors for Respondents.

J. H. HAUSER, *Advocate.*

EASTERN DISTRICT OF WISCONSIN, *ss:*

Stephen M. Booth, being duly sworn, says that he is one of the respondents to the aforesaid libel, and that the foregoing answer is true, as he verily believes.

S. M. BOOTH.

Subscribed & sworn to before me this 5th day of January, 1872.
W. P. COOLBAUGH,
U. S. Court Comm'r in & for East. Dist. of Wis.

24 And now, at this same term, to wit, January term, 1872, and on the fifteenth day of said term, to wit, on the 17th day of January, A. D. 1872, the following proceedings were had, to wit:

Hearing.

THE UNITED STATES OF AMERICA, APPELLANT,
vs.
THE STEAMER MONTELLO, HER BOATS, &C.—Stephen M. Booth & Charles W. Slayton, claimants.
} Appeal in admiralty.

This day, pursuant to the mandate of the Supreme Court of the United States, this cause came on to be heard upon the amended libel, answer thereto, and the proofs, and, by consent, before the honorable Andrew G. Miller, district judge, Mr. Levi Hubbel, district attorney, appearing for the United States, and Messrs. Hauser & Colman for the claimants; and, being argued by the said counsel, and submitted, the court held the same under advisement.

The following is the testimony taken in open court at said hearing, and reduced to writing by a phonographic reporter, and filed, to wit:

Testimony.

Defendant's attorneys concede that the steamer Montello was not enrolled and licensed.

U. S. Attorney concedes that the steamer Montello had not certificate of inspection.

NATHAN GOODELL, a witness for the libellant, being duly sworn, testified as follows:

25 Q. Where do you reside?

A. At the city of Green Bay.

Q. When did you first come to Green Bay?

A. I first came to Green Bay in 1827.

Q. How long did you remain there?

A. But a very short time then, two or three days.

Q. When were you there again?

A. In 1830.

Q. Did you then become a permanent resident there?

A. No, sir; temporary. I was then attached to the 5th infantry, and was acting as sutler. After being there a year, the four companies were removed to Fort Winnebago.

Q. You were sutler at the time at Green Bay, for a year, and then you went with the regiment to Fort Winnebago?

A. Yes, sir; as soon as I was able. I was sick at the time. I was only the acting sutler.

Q. Have you, from 1830 up to the present time, been more or less familiar with the Upper and Lower Fox rivers, and the means of navigating them to Fort Winnebago?

A. Yes, sir; I have been.

Q. Have you carried on business in connection with that navigation?

A. I have.

Q. In what way did you convey your sutler goods from Green Bay to Fort Winnebago, in 1830 or 1831, when the regiment moved?

26 A. In Durham boats, or, more properly, Mackinaw boats.

Q. What stuff was carried there at that time?

A. General merchandise, clothing, dry goods, groceries, and provisions.

Q. Products of Wisconsin, or of other States and places?

A. Other States.

Q. Did the boats in which these things were carried return to Green Bay?

A. Yes, sir; they did.

Q. What, if anything, did they carry back?

A. It was very seldom that there was much of anything to carry back, but occasionally, furs; sometimes some return goods; occasionally some shot or lead. There was very little at that early day.

Q. Do you remember whether, at that early day, you did purchase and send back furs for general marketing?

A. Yes, sir; frequently I used to have more or less furs to send, but never any great amount.

Q. How long did you remain at Fort Winnebago?

A. About two years and a half.

Q. In what way did you continue to get your sutler goods for the supply of the fort?

A. By these same Durham boats.

Q. Now please commence at Green Bay, state the width of the

27 river there, and describe the river from that point down. (up?) How wide was the river at Green Bay?

A. I don't recollect exactly what the width is. It is something near a quarter of a mile.

Q. How far did you find deep water?

A. To Rapid De Pere, that used to be called five miles from Green Bay.

Q. How much of a rapid did you find there?

A. My impression is—I don't recollect about the Durham boats—when I passed there I passed it with my family in a bark canoe and we had a heavy load, and we passed without taking out anything. It is my recollection that the Durham boats passed there without taking out any part of their cargo, but the current was very strong, I think. The next obstruction was at Rapid De Croche, that was eighteen miles above Green Bay, thirteen above De Pere.

Q. How much of a rapid was there?

A. A very strong rapid; but my recollection is indistinct there.

Q. You can't say whether boats passed there without unloading?

A. No, sir. I cannot.

Q. After you passed that rapid in going up the river, what was the next?

A. About two miles above that is the Grand Kokona Rapids. Kakalin Rapids is the original name.

28 Q. What is that rapid?

A. Quite a strong rapid, very large and very strong. The water was not very deep but full of rocks, and the current was very strong.

Q. How did you go by?

A. Everything had to be taken from the boats there. Generally they put a long rope or cordel on there, one man steering and keeping the boat straight.

Q. The boat was carried up in the stream?

A. Yes, sir.

Q. How far were the goods carried?

A. The goods were more generally carried from there up to above Cedar Rapids by land; that was about five miles.

Q. What was the extent of that rapid at Grand Kakalin?

A. From one-quarter to half a mile. I forget the exact distance?

Q. Could the boats have been loaded again after having passed that distance?

A. Yes, sir; they might for a short distance, and I think only apart of the load at a time, up to the foot of Cedar Rapids. This distance to the foot of those rapids would have been about two miles or two miles and a half.

Q. How was Cedar Rapids passed?

29 A. That was passed by the empty boats; the men used to wade on each side of the boat.

Q. What was the next rapid?

A. The next was the Grand Chute.

Q. That was Appleton?

A. The boats used to come to below the chute and unload. There was a depression in the rock several feet from the shore, where you could raise the bow of the boat by all hands, but then they generally had to have the crew of boats.

Q. State how the boat got along?

A. They would lift the boat up in that manner, and then go ashore and take the stuff all on again.

Q. How far is that Grand Chute above Cedar Rapids?

A. I don't distinctly recollect—something like three miles. I don't recollect the distances along there very well, it is so many years ago.

Q. There you had to unload?

Q. What was the next rapid?

A. Winnebago Rapid. After coming above the chute, they loaded the boats again and went on to Winnebago Rapid. At Grand Chute they had to lift the boat over the rocks, and then reload above Grand Chute.

Q. How was that?

A. There was one solid rock there—it is about two foot and a half there. They took hold of the bow of the boat and lifted it on the rock, and then all hands shoved it over. Then they reloaded.

Q. Then you went to Winnebago Rapids?

30 A. Yes, sir.

Q. Is that now Menasha?

A. Yes, sir; that is on the Neenah side.

Q. How far is that above Grand Chute?

A. About five miles, that is my recollection—five or six miles.

Q. How did you go over Winnebago Rapid?

A. At the foot of the rapids, according to the state of the water, we generally took off about one-half load, sometimes two-thirds, and went up three-quarters of a mile, and then we came back. Sometimes we took the whole load up in two times, and sometimes three times.

Q. That was the opening of Lake Winnebago?

A. Yes, sir; that was the outlet of Lake Winnebago.

Q. How much of a fall was there?

A. The fall is very gradual, the water was low and rocky, full of cobblestones.

Q. What was the general width of this Lower Fox River from Lake Winnebago to Green Bay?

A. It didn't vary a great deal generally. In some places the water was wider than at Green Bay, but probably it might have been considered, on an average, as two-thirds of the width it was at Green Bay, where it was about a quarter of a mile.

Q. What was the character of this stream as to its falling or rising?

31 A. There was seldom any great rise. The stream was generally very uniform. The large basin of Winnebago Lake seemed to hold the water, so that the water in the river never changed very much. Although sometimes for a very few days there might be considerable difference, but that would be of very short duration. It would soon fall back to a level.

Q. The height was very uniform?

A. Yes, sir; as a general thing.

Q. From Winnebago Rapids to Oshkosh about how far is it?

A. About twelve miles.

Q. That was lake navigation?

A. Yes, sir.

Q. Proceed and state whether your boats were obstructed or not in going from Oshkosh, the mouth of the Upper Fox River, to Fort Winnebago?

A. My recollection is rather indistinct in relation to the Upper Fox River. But I don't recollect of any particular obstruction until we got up to Lake du Boeuf; it is called Buffalo Lake now.

Q. How far from Oshkosh?
A. 35 or 40 miles.
Q. Was it above or below what is now Montello?
A. I don't know where that is; those towns have come there since I was up the river.
Q. Do you know where Packwaukee is?
A. No, sir.
32 Q. What was there at Lake du Boeuf?
A. The river is very narrow; there is quite a fall or sand-bar there, the water there was very shallow, it was very difficult to get over that.
Q. Describe that place?
A. It is at the outlet of Lake du Boeuf.
Q. How much of an obstruction was that?
A. I am unable to answer very directly about that. I don't know whether we had to take out part of the cargo or not. I know we had difficulty in going over there, but I think it was more talk than anything else.
Q. How far is that from Fort Winnebago?
A. It may be some forty miles, about half way from Oshkosh to the fort.
Q. From there on to the fort was there any other obstruction that you remember?
A. It might be considered quite an obstruction when you got to Mud Lake. There was very little water there. It was a thin jelly of mud. We had to work our boat through the mud, get on all the power we could with poles and work it through the mud.
Q. How far was that below the fort?
A. That might have been fifteen or twenty miles. I can't recollect the distances there.
Q. That was called Mud Lake?
A. Yes, sir; truly called so.
33 Q. Well, how was it from there to the fort?
A. I don't recollect of ever having had any particular difficulty so far as unloading was concerned. There was a great many sand-bars that it was difficult to get over in low water. The water was generally low. There was very seldom a good head of water there.
Q. When your boats went back again to Green Bay, was there ordinarily any necessity for unloading?
A. I think not until we got into the Lower Fox.
Q. Has that navigation been improved since the time you were speaking of?
A. Yes, sir; by way of this canal; various locks and canals.
Q. Where is the first lock in coming from Green Bay?
A. At De Pere.
Q. What is the size of the locks on the river?
A. That I am unable to answer.
Q. Where is the next lock?
A. The next lock is about 11 miles from the bay, I think; about 5 miles from De Pere.
Q. Isn't that De Croche?
A. No, sir. The next was Rapid De Croche. That is about 18 miles above Green Bay.
Q. Where is the next?
A. The next is at Grand Kakalin.
Q. Are there several other locks after that?

A. Yes, sir; but I can't recollect where they are placed.

34 Q. Between that and Fort Winnebago?

A. Yes, sir; but my general acquaintance with the river is before it was improved.

Q. Have you with you a copy of an advertisement in regard to the business of the river which you put out in 1844?

A. I have, sir.

Q. I wish you would look at it, and then state whether or not some parts of it were according to the facts at that time.

(Objected to.)

Q. Were you or not engaged in business at Green Bay in 1843 and 1844.

A. Yes, sir.

Q. Did you in the course of your business put out an advertisement to the public at that time?

A. I did.

Q. Have you a copy of that advertisement with you?

A. Yes, sir; it seems so.

Q. You may read such portions of that as are substantially correct.

(Objected to. Objection sustained. Exception taken.)

Q. State whether or not any trade was carried on from 1835 to 1850, up and down the Upper Fox River to Lake Winnebago. State whether any trade was carried on during that fifteen years, on those rivers, and to what extent.

35 A. I have very imperfect ideas except as to the three or four years I was engaged in it.

Q. What part of the time were you engaged in business.

A. I think I did my first boating in 1841. I was carrying up provisions to the Menomonee payments, and I may have gone up to Winnebago that season with provisions. It is my impression that I did; and the same again in 1842, 1843, and 1844. But the kind of business done, so far as my recollection goes, was principally the transportation of Government property to Fort Winnebago, and for the Indian payments in the fall. There was very little merchandise going up at that early day, except for the troops.

Q. What kind of merchandise was taken up? Was it the growth or product of Wisconsin?

A. No, sir; it was otherwise; it was for the United States troops—clothing, goods, and groceries.

Q. Brought from out of the Territory?

(Objected to. Objection overruled.)

A. Yes, sir.

Q. The freight upon those boats in 1843, 1844, and 1845—was it the product of Wisconsin, or of other States and places?

A. I would say it was from other States, with one exception. It might have been in 1845, I don't recollect exactly, when flour was

36 made at Neenah for the Indian payments.

Q. What did you carry back in the boats?

A. If there was any Indian goods left, they were returned, sometimes some empty barrels, sometimes some barrels of pork—those were return goods.

Q. Up to 1850 were there settlements upon the Fox River, or adjacent to it, or on the Wolf River, which emptied into the Fox, which carried on trade with Green Bay, and with places through Green Bay?

A. I can't answer that question very definitely, but I should think there began to be little settlements doing a little trade.

Q. How was it with Oshkosh? Did they carry on any trade through Green Bay up to 1850?

A. Yes, sir. What business was done, was done by way of Green Bay.

Q. If anything else occurs to you about the navigation of the stream in its early days, you may state it.

A. I think you have obtained all my points.

Cross-examination:

Q. When did you first go up the Fox River?

A. In 1831.

Q. When did you go up the river to carry up freight?

A. In 1841.

Q. Did you go up the falls at De Pere?

37 A. I have very indistinct recollection about that fall. I am governed more by information than by my own personal knowledge. The lock might have been built at that time.

Q. You testified you went up in a bark canoe without unloading?

A. Yes, sir; I think I took my wife and two small children without unloading.

Q. Could you row up the rapids?

A. Yes, sir; the Indians took us up there. They paddled the canoe up.

Q. How many Indians did it take?

A. I don't recollect whether three or four, and they might have used poles. I don't recollect. I remember there was a very strong current.

Q. At the Kalkalin, you say they sometimes used to take a rope and pull it up?

A. Yes, sir; sometimes they would rig up a derrick, and do it with pulleys.

Q. What years was this?

A. This was 1842, 1843, and 1844. I don't recollect whether I had anything to do with it in 1845.

Q. How large a fall was there at Kakalin?

A. There was no direct fall particularly. There was rapids.

Q. How long were the rapids?

A. May be half a mile.

Q. Weren't they about a mile?

A. I don't recollect. It may be.

Q. How far did you carry your goods there?

38 A. Generally we used to take them from there to Cedar Rapids.

Q. How far was that?

A. Five miles, I think.

Q. Was there a road?

A. Yes, sir.

Q. A laid-out road, or Indian trail?

A. There was a laid-out road—I don't know whether legally or not—but there was a wagon-road.

Q. Was the river rocky?

A. Yes, sir.

Q. Could a boat pass down the river with a load on without being in danger of being smashed to pieces?

A. It could not over those rapids. We had to unload there.

Q. How high were the rapids at Grand Chute?

A. I believe they used to be called two feet and a half. The fall is perpendicular. The water came over there like over a dam.

Q. Could a boat sail up that river?

A. I think not; not all the way.
Q. How much of the river could it sail up?
A. It might sail up portions of the river with light draft.
Q. How large a boat?
A. Not a very large boat. In some places there is good many
39 feet of water, from six to ten feet. But those places were few and far between until you got to Kakalin.
Q. Could a steamboat go up that stream?
A. No, sir; a steamboat could not go up the stream—not a steamboat of any magnitude—it could not go up the rapids.
Q. What do you call any magnitude?
A. A boat of 100 tons.
Q. Well, could any of less size than that?
A. No, sir; I don't think any steamboat could pass the Winnebago Rapids.
Q. Could any steamboat or any sailing vessel go up the Grand Chute Rapids without being lifted over?
A. No, sir.
Q. Could any steamboat go over the Winnebago Rapids?
A. No, sir; not of any size. The water was very shallow and rocky.
Q. Could a steamboat or sailing vessel be got from Green Bay to Oshkosh without being carried or lifted over the rapids in the Lower Fox?
A. No, sir.
Q. Could they go from Oshkosh to Portage clear through Buffalo Lake and Mud Lake?
A. I think not in those days—that would be my impression; that is, a steamboat of any size—of any size that could be called steamboats.
Q. Could a steamboat go from Winnebago to Green Bay?
40 A. No, sir; I should say not—not with any safety.
Q. Could a sail-boat?
A. No, sir; not a sail-boat of any size.
Q. Was there any outlet from Portage to Oshkosh on that stream, otherwise than the stream you have described?
A. No, sir.
Q. A boat on the river from Portage to Oshkosh—could it come out in any other way than by going down the Fox River?
A. I don't know of any other way.
Q. What is a Durham boat?
A. It is a very large barge, sharp at the bow—a boat from 70 to 100 feet in length, from 10 to 13 feet beam.
Q. What were the boats that you ran through?
A. That is what I am describing; those are the size boats I used.
Q. How deep?
A. The larger class would be about three feet.
Q. How deep did they used to draw in the water?
A. From 12 to 18 inches of water; and when loaded, two feet to two and one-half feet.
Q. At those times of which you speak, was there any water connection between Fort Winnebago & Portage?
A. I have forgotten what year that canal was made.
Q. Was there any in 1845?
41 A. Yes, sir; I think it was built in 1845. I am not positive.
Q. Was there any water-communication there of any kind before the canal was built?
A. No, sir.
Q. What is the nature of the land there?

A. It is very flat and sandy. We used to take our barges out at Fort Winnebago and draw them across there with teams.

Q. How many teams would you use?

A. It would take two good yoke of oxen to draw a barge across?

Q. Could you draw a barge 100 feet long in that way?

A. The American Fur Company took all their barges across in that way, but they were smaller. I don't know whether we could take ours across with only two yoke of oxen. I don't recollect how many we used for our barges. The American Fur Company kept cattle there for that express purpose.

Q. Where is Portage City?

A. It is on the Wisconsin, about a mile and a half or a mile and a quarter.

Q. It is about a mile and a quarter from the Fox to the Wisconsin?

A. Yes sir.

Q. Have you been up there since the canal was built there?

A. Yes, sir.

42 Q. How was water-communication then between the Fox & Wisconsin Rivers?

A. In consequence of the canal, when the water is high, it will come through the canal into the Fox. Sometimes it used to overflow from the Wisconsin and come into the Fox above the canal.

Q. Are there any locks up there?

A. Yes, sir. There is a lock at each end of the canal.

Q. In going from Portage City to Oskosh, did you have to go through this canal?

A. Yes, sir.

Testimony of John L. Williams.

JOHN L. WILLIAMS, a witness for the libellant, being sworn, testified as follows:

Q. Where do you reside?

A. Oshkosh.

Q. Where were you born?

A. Green Bay.

Q. Your father was the late Eleazer Williams?

A. Yes, sir.

Q. What year were you born?

A. 1825.

Q. Have you been, since you were old enough, acquainted with the Upper and Lower Fox Rivers?

A. I have boated on it some; been up and down there.

43 Q. Do you remember what year the first State work was done on the river, making locks, &c.?

A. No, sir. I could not state what year.

Q. What was the condition of the river as to navigability from Green Bay up to Oshkosh, & from Oshkosh above, if you know, on the Fox River, from 1835 to 1850?

A. I had no experience at that time, until about 1843.

Q. State any part of that time?

A. I used to go up the river occasionally in Durham boats.

Q. What was the size of the boats used at that time.

A. I think they were about 80 to 85 feet long, and about 12 to 13 feet wide, & from 11 to 13 feet beam.

Q. What depth of water would they draw when empty, & what when loaded?

A. When empty about five inches; when loaded they would draw about ; their average depth of hold was about 34 inches, & they would load about two feet.

Q. What amount of freight and passengers in tons would they carry?

A. I could not say. I can say this much, that I can remember that one time that we had a load of over 100 barrels of flour, and I think about thirty barrels of pork.

Q. How many hands?

A. Ten of us.

44 Q. What year was that?

A. I think it was 1843.

Q. In what way could such a boat, loaded in such a way, go from Green Bay to Oshkosh, or Lake Winnebago?

A. We started from the bay & came by Kakalin & unloaded there and carried the goods across for about a mile and a little over, & then we unloaded again at the Grand Chute, and came back after that part.

Q. How did you go over Grand Chute?

A. We run the boat close up to the chute and unloaded.

Q. How far did you carry your freight by land until you loaded it on again?

A. Only a short distance. We just rolled it around the chute and loaded it on again.

Q. From there what was your progress?

A. We came on up to Oshkosh.

Q. Was there any obstruction between Grand Chute & Oshkosh?

A. There was Winnebago Rapids; there was obstructions there. I think we unloaded part of our load there. We had two barges at the time I am speaking of, & there was two crews; & and I could not be positive how many trips were made with the two boats. We helped each other along.

Q. You didn't put those goods on to land except at two places; one at Kakalin & one at Grand Chute?

45 A. Yes, sir; we did not unload at the Little Chute. When near to the foot of the Kakalin Rapids, we got some teams to haul the freight above the rapids, and by the time we got there, they had some goods there, and we took them aboard.

Q. After you passed the rapids at Neenah, or the Winnebago Rapids, did you meet with any obstructions there up to Oshkosh?

A. No, sir.

Q. Did you go up above Oshkosh?

A. Yes, sir; we went to Fort Winnebago.

Q. Describe the manner in which you got through to Fort Winnebago?

A. We found no obstruction until we found what is called "Leonard's Bar." It was a little below that, but it was not called so then. It is called "Squaw Channel" now sometimes. It was below the cut.

Q. How far from Oshkosh?

A. About 85 or 80 miles.

Q. What was that obstruction?

A. It was the banks that had caved in and washed into the river. There was high sand-banks that had caved into the channel.

Q. How did you get along?

A. We threw our pork off and some flour, & went on. We rolled the flour on the bank of the river.

Q. Did you carry it by teams?

46 A. No, sir. We threw our pork overboard into the water, and the flour we rolled on the edge of the bank. We rolled the pork in the water, and then picked it up again. The water was very shallow, and we rolled the pork up to where the barges were, & the flour also.

Q. Was there any further obstructions before you got to Fort Winnebago?

A. After we got to the mouth of the Neenah River, we unloaded there again. We thought we could make a quicker trip if we would leave a part of the load.

Q. Wasn't the Lower Fox River called the Neenah River in those days?

A. Yes, sir.

Q. When you got to Winnebago, how did you get into the Wisconsin?

A. We stopped at Fort Winnegago, and unloaded there.

Q. Did you carry anything but flour & pork?

A. No, sir; I think not.

Q. What trade or business, from 1841 to 1850, was carried on between Green Bay & the places up the Fox River, from Appleton, Neenah, Menasha, Fort Winnebago, & Portage?

A. I went up several trips for different men & for the Indian payments, and I helped men move families to Calumet in Durham

47 boats, & I went to the Indian payments, in Durham boats.

Q. Where were they held?

A. At Winneconne at that time, on the Wolf River.

Q. How far is that above Oshkosh?

A. About 13 miles.

Q. What did you carry on those occasions, the products of Wisconsin, or the products of other States and places?

A. When I went up to the payments, we carried goods from merchants, from all parts of the country. They came in from abroad, & some from Green Bay.

Q. Were those goods manufactured in Green Bay, or purchased and imported into Green Bay?

A. They were imported. There was no manufacturing there at that time.

Q. How was it with the flour and the pork that you carried at that time, was that from some other State, or from Wisconsin?

A. I could not say where the flour was from, or where the pork was from.

Q. Was there any manufactory of flour at Green Bay at that time, in 1843?

A. Mr. Ellis had a mill—a small water-mill.

Q. Was this flour manufactured at Ellis' mill?

A. I could not say.

Q. Do you know of any trade carried on by the fur company through that line of rivers prior to 1850?

48 A. Yes, sir; I carried up goods for them; that is, if you call Judge Law "The American Fur Company." I carried goods for him to his traders. He had posts up there, & I used to take back stuff from them.

Q. You don't know personally of any loads being carried past Portage into the Wisconsin?

A. No, sir; not personally.

Cross-examination:

Q. Did you ever see the steamer "Black Hawk?"

A. Yes, sir.

Q. Where was it?

A. The one that Captain Noteling brought up was at Green Bay when I saw her.

Q. Did you ever see her after that?

A. Yes, sir.

Q. Where?

A. I saw her in the slough at Kakalin.

Q. What was she doing there?

A. Lying on her beams end.

Q. When was that?

A. It must have been some time in 1842 or '4, I think.

Q. Do you know anything about the history of that boat; where she was built, & why she was left?

A. I could not tell where she was built. She was canal-built. I don't know where she came from.

Q. She was at Green Bay?

Q. What did they undertake to do with her?

49 A. They wanted to bring her to Lake Winnebago.

Q. Did they accomplish it?

A. No, sir.

Q. Why not?

A. I could not say. There may be two reasons. I saw her on rollers, I think, about one-half mile from the lower landing at Kakalin, between the head of the rapids and the foot, with some men working on her.

Q. Why was she on rollers?

A. They were trying to get her up the rapids.

Q. Could they get her up in the water?

A. I didn't say they tried that way. I could not say.

Q. Did they get her up on land?

A. No, sir.

Q. Where was she then?

A. When I saw her she was on land, about one-half mile from the landing.

Q. Did they leave her lay there & rot?

A. I don't know what became of her. The last time I saw her she was laying in the slough, by the warehouse.

Q. Was the engine taken out of her?

A. Yes, sir. I don't know exactly the time. I think it was between 1842 & '4.

COURT. Q. What was her ton'age?

A. I don't know.

Q. What was her length & breadth?

50 A. From the best of my knowledge, I should judge about 80 feet long, it might have been a hundred, and 14 or 15 feet beam, canal-boat built—it was built on the canal-boat style.

Q. Do you know that they tried to get her up the river by water?

A. I don't know. I was not there.

Q. How much would 100 barrels of pork & 30 barrels of flour weigh, or how much does a barrel of pork weigh?

A. About 300 pounds.

Q. Is it any more?

A. I don't know. I never weighed it.

Q. And the flour 200?
A. Yes, sir.
Q. Then those boats would carry 14 tons & a half?
A. Yes, sir. There was one of our boats carried that, I know, & one of them, I think, was larger.
Q. How much did the largest boat carry?
A. 15 or 16 tons. I think there was some boats that would carry 15 tons.

Testimony of D. M. Whitney.

DANIEL M. WHITNEY, a witness for the libellant, being sworn, testified as follows:

Q. Where do you reside?
A. Green Bay.
Q. How long have you resided there?
A. I came to Green Bay in 1833.
51 Q. How old were you at that time?
A. About 17 years of age.
Q. Have you been acquainted with the Upper & Lower Fox rivers, and Lake Winnebago, since that time, & from that time forward to 1850?
A. I was with the Lower Fox; not with the Upper Fox. My particular acquaintance was with the Lower Fox.
Q. What business, if any, was done upon this Lower Fox River, by boats, from the time you knew it up to 1850?
A. Quite a large amount of transport done on Durham boats; some call them keel-boats.
Q. Did you do any part of it yourself—did you take part in it?
A. Yes.
Q. During what year?
A. During the fall of 1833 was my first experience.
Q. After that did you do any?
A. Yes, sir; some as late as 1850.
Q. What was done in 1833 & '4?
A. We loaded boats with goods and merchandise for a shot-tower on the Wisconsin. I started with two boats in November, 1833.
Q. What was the point you started for?
A. That shot-tower was at Helena. There was a shot-tower being built there at that time.
Q. How did you get those goods there?
52 A. We got them so far as the Kakalin Rapids, & we froze in there; & we hauled off the goods with teams.
Q. What was the means of getting up the river, at that time? State how you got along with those Durham boats.
A. They were propelled partly with poles or oars, from Green Bay to Lake Winnebago.
Q. What obstructions were there there?
A. The first obstruction, of any amount, was at Grand Kakalin. There we unloaded the boats & hauled the goods about one mile with teams.
Q. What next?
A. The next was the "Cedar Rapids." There we sometimes had to make half-loads. Sometimes we could get the boats up by doubling the crews, putting both crews on one boat, & get them up without taking anything out. The next place was the Grand Chute. There we had to unload everything.

Q. What was the obstruction there?

A. Rocks in the river. There is a perpendicular fall there, from 2½ to 3 feet, & the rapids was some little distance.

Q. How deep was the water from the fall down?

A. Perhaps two feet. We used to run the boats down with part loads in, and jump the chute—put the men on the bow to guide her down.

Q. There you unloaded wholly?

53 A. Yes, sir.

Q. And from there to Lake Winnebago was there any difficulty?

A. Yes, sir; at the Winnebago Rapids, we took out one-half loads there & went back after the load.

Q. When were you first, if at all, up the Upper Fox River?

A. I never was up the Upper Fox further than Berlin in my life.

Q. When were you up there first?

A. I think in 1855 or '6. I didn't go with the boats. I used to go on horseback. I never went on the boat from Oshkosh to Winnebago.

Q. Do you know the fact whether there was trade carried on prior to 1850 between Fort Winnebago and Green Bay, by boats?

A. Yes, sir.

Q. What did that trade consist in?

A. General merchandise; also pork and flour & provisions.

(Def't's counsel admit that at that time, there was freight carried there which was the product of foreign states.)

Q. Do you know whether at times the Wisconsin River overflows the Fox River in a state of nature?

A. Yes, sir; I have been there when the water was all over there up to the horse's belly—two or three feet deep. I think that was in 1848 or '9.

54 Q. Since 1850, what improvement has been made in the Lower Fox River, as to its navigation?

A. The first lock on the river is at De Pere, 5 miles from Green Bay; the second at De Croche, 18 miles from Green Bay; the next at Kakalin, twenty miles from Green Bay—there was a long string of locks, I think five; the next was at the Little Chute, I think two locks there; the next at the Cedar Rapids, one lock; the next at Appleton, I think three locks, I am not positive; the next was at Menasha, one lock; in all, I think seventeen locks on the river between Green Bay & Lake Winnebago.

Q. Since the construction of those locks, what size vessels pass & repass from Green Bay to Lake Winnebago?

A. There are steamers there that carry from 60 to 150 tons, & I think there are some barges for carrying wood that will carry two hundred tons.

Q. The harbor at Green Bay has been improved in some way during the last few years?

A. Yes, sir.

Q. By what means or authority?

A. By the Government of the United States, by dredging—building breakwater.

55 Q. What ton'age of vessels can pass through now?

A. From 50 to a thousand tons. Any vessel that can pass the "St. Clair Flats" can come into Green Bay.

Q. What depth of water was there in the channel entering from Green Bay into the Fox River before the improvements were made?

A. The lowest water we had was 12 to 14 feet originally. The chan-

nel was very crooked before the improvement. By making this improvement they shortened it some two miles in seven.

Q. The particular object was to shorten the distance?

A. Yes, sir; to make a short cut that shortened it about two miles.

Q. There was always an entrance for vessels from Fox River into Green Bay?

A. Yes, sir.

Q. What depth of water was there from Green Bay up to De Pere?

A. From 15 to 20 feet always. Any vessel that could come through the harbor had no trouble in coming up to De Pere.

Q. Do you know whether vessels—steamboats as large as may pass through the locks on the Lower Fox—can go up the Upper Fox River to what distance?

A. I think any boat that can pass the Upper Fox can pass the Lower Fox to the Mississippi.

56 Q. Have you known boats passing from Lake Winnebago into the Wisconsin and so into the Mississippi?

A. Yes, sir; several.

Q. In what time?

A. Since 1850.

Q. Has there not been, since 1856, an extensive trade & commerce carried on from Green Bay up the Lower Fox River into Lake Winnebago & the Upper Fox & Wolf Rivers.

A. Yes, sir.

Q. What did it consist of?

A. There was a large amount of things taken up by that route, and a large amount of flour & wheat taken down.

Q. About how many steamboats are employed in the navigation of the Fox River and Lake Winnebago, so far as you know, since 1867, during each year?

A. From 10 to 12 different boats each year—perhaps not as many as that lately, since the railroad has been in operation. I think, perhaps, last year there was not more than five or six.

Q. Do you know whether or not the boats upon the Upper Fox River running to Berlin, take goods & produce to & from the railroad that passes at Berlin, whether they carry wheat or produce to Berlin,

57 and take it at Berlin or bring it to Green Bay?

A. I think they do back & forth, from Oshkosh & Green Bay, both.

Q. What railroad passes at Berlin, or terminates at Berlin?

A. I don't know what the name of the road is. I think it is a branch of the Milwaukee & St. Paul.

Cross-examination:

Q. Do you know anything about the steamer "Black Hawk?"

A. I don't know personally. I don't know as I ever saw her. I think I have.

Q. Do you know anything about her history?

A. Only from what I have heard.

(The district attorney admits that there was an attempt made to navigate a steamboat of 100 feet long on that river before the improvements were made at the time stated, and that the attempt failed.)

Q. Is there a lock at De Pere?

A. Yes, sir.

Q. Is there anything besides a lock there?

A. There is a dam there.

Q. Could a boat go down that river without going through the lock?
A. Yes, sir.
Q. Is there a canal at De Pere?
58 A. Yes, sir; a short distance.
Q. How is it at Kakalin?
A. There is a dam & 5 locks. From the lower lock to the upper lock there is one mile. Those locks are connected.
Q. Is that a natural channel?
A. No, sir.
(The dis't att'y admits that all those improvements were made by parties engaged under the laws of the State of Wisconsin and the laws of the United States, and that the Green Bay and Mississippi Canal Company has the controlling agency of that work.)

Testimony of W. Beaupre.

WILLIAM BEAUPRE, a witness for the libellant, being sworn, testified as follows:
Q. Where do you reside?
A. In Green Bay.
Q. What has been your business since 1845?
A. In 1845, I was clerking up to 1847. In 1847 I was running boats up.
Q. Have you been acquainted with the Fox River and Lake Winnebago & their navigability since 1847?
A. I was well acquainted from Green Bay up to , but little from there upwards.
59 Q. Are you acquainted from Green Bay up to Kakalin?
A. Yes, sir; I ran there about 5 years.
Q. In what boats or vessels did you run the river?
A. Durham boats.
Q. What years was it?
A. 1847, '8, & '9, up to 1852.
Q. When did the improvement first take place on the river at De Pere and Kakalin?
A. 1849 or 1850. I ran one or two boats before the improvement of the river, when there was one lock at De Pere. I think they commenced the work in 1848 & '9.
Q. That was the old lock made for the water privilege?
A. Yes, sir; it was the old thing.
Q. For the benefit of the mill company?
A. Yes, sir; it set the water back a great ways.
Q. Before the said works were commenced, what means were there of going up the river so far as Lake Winnebago, if you know?
A. I used to take a barge of about from 15 to 20 tons, according to the state of the water. When the water was high we ran 20 tons.
Q. How far did you go with that?
A. To Big Kakalin.
Q. How far from Green Bay?
A. About 21 miles.
Q. Then did somebody else take the boat?
A. No, sir; I unloaded there & went back to Green Bay.
60 Q. What became of the goods?
A. They were drawn by teams above Grand Chute.
Q. Then what?

A. Then there was another barge on which they were reloaded & shipped on.

Q. Where were the goods designed for?

A. For different parts of the country: Oshkosh, Fond du Lac, the Upper Fox River.

Q. What has been the condition of that river for navigation with the improvements, for the last 10 or 15 years?

A. The boats carry all kinds of goods, hardware, groceries, flour, & wheat.

Q. Goods brought from out of the State of Wisconsin?

A. Yes, sir.

Q. What did they carry down the river?

A. Flour, wheat, &c.

Q. How large boats run there?

A. I think, from 150 to 200 tons. I cannot state definitely.

Q. Have you ever passed any of the locks in the Upper Fox River?

A. No, sir.

Q. You have no personal knowledge how large those locks are?

A. No, sir; I never run any steamboat up there. When I quit the river I sailed on the lakes.

61 Cross-examination:

Q. Do you know anything about the Black Hawk?

A. I have heard of her. I know nothing about her.

Q. Why didn't you take your boat above Kakalin, to Grand Chute?

A. I suppose the owner didn't think it was profitable. I did once take one boat, but I took her up light.

Q. Did boats generally, when you were on the river there, from 1845 to 1850, did they generally go to Kakalin & unload?

A. They always unloaded there & then they were turned back to Green Bay, & then the goods were taken above Grand Chute by teams.

Q. And then loaded on other boats?

A. Yes, sir; that was the custom.

Q. From 1845 to 1850?

A. From 1847, is all I know.

Redirect examination:

Q. What year was it that you took one boat up there?

A. I think, in 1850, I went so far as the "Indian payment."

Q. Wasn't that in 1857?

A. It may be it was.

62 *Testimony of Tho's L. Humes.*

THOMAS L. HUMES, a witness for the libellant, being sworn, testifies:

Q. What, if any, office have you held for the last few years under the Government of the U. S.?

A. I held the office of boiler inspector of steamboats for the district of Chicago, from 1865 to 1869, and now hold the office of boiler inspector of steamboats for the district of Milwaukee.

Q. What was embraced in the Chicago district, from 1865 to 1869?

A. All of both sides of Lake Michigan and its tributaries, and Lake Superior & its tributaries.

Q. Were the Upper and Lower Fox rivers embraced in your district, and Lake Winnebago and Green Bay?

A. Yes, sir.

Q. Were you, in 1866 and 1867, acquainted with the steamer Montello, involved in this action?

A. Yes, sir.

Q. State generally her dimensions?

A. She is a boat about seventy-five feet long, and about sixteen feet beam, and about four feet in the hold. I don't know positively the exact figures, but those are about the dimensions.

Q. Are you acquainted with the locks upon the Upper and Lower Fox rivers?

63 A. I have navigated through them.

Q. Would that boat, the Montello, pass through those locks?

A. Yes, sir.

Q. Did you examine this boat, in 1867?

A. I did.

Q. About what time, and where?

A. I think it was some time in June, at Berlin.

Q. In this State?

A. Yes, sir.

Q. What, if anything, did you find wanting to comply with the acts of Congress of 1866, or of 1852, in relation to the safety of passengers thereon?

(Objected to.)

Q. What did you find wanting on this vessel to comply with the act of 1852?

A. I found wanting a water-*guage* for the boiler, and a safety-valve that could be taken wholly from the control of all persons navigating the vessel.

Q. A lock safety-valve?

A. That is the technical name for it.

Q. Had she an enrollment or license at that time?

A. No, sir.

Q. Who was in command or control of the vessel at that time?

A. I am not positive now whether Mr. Bould was her master at that time, or whether Petersen was. I think, one of the two.

Q. Do you know who was the controlling proprietor?

64 A. She was owned at that time by Bould and Slaton, I think. I don't know the proportion owned by each.

Q. Did you explain to them anything about the matter that was wanting?

A. I did.

Q. State what you said to them?

A. I told them it was necessary for them to provide their boiler with a water-*guage* and a lock safety-valve, that is, a valve that could be taken from the control of all persons except inspectors. They told me the water-*guage* could be procured there, and wanted to know where they could get a safety-valve. I told them at Chicago, and if they wanted, I would forward them one by express.

Q. Did you, or not, give them to understand distinctly that such a safety-valve and such a water-*guage* were required upon that boat?

A. Yes, sir.

Q. Did you again see that boat after that time; and, if so, state whether she had then been provided with this water-*guage* and safety-valve?

A. I saw her subsequent to that time. She had not been so provided.

Q. How long after?

A. I think it was in September. It is some time ago and I would not

be positive as to the time exactly. I think I saw her a number
65 of times during that season.

Q. Was it before the seizure of the vessel took place?

A. Yes, sir.

Q. Was she then, or not, supplied with this safety-valve and water-guage?

A. She was not.

Q. Was she at the time she was seized by the marshal, on the 1st of October?

A. No, sir.

Q. Do you know whether at time she was enrolled or licensed?

A. I think she was not. I will state one thing further, that, in the spring of 1867, I received specific instructions from the Secretary of the Treasury not to issue any——

(Objected to.)

Cross-examination:

Q. Did you inspect this steamboat in the month of June, 1867?

A. I think it was June. I wouldn't be positive; it was along in the fore part of the summer.

Q. Did you issue a certificate of inspection?

A. Yes, sir.

Q. Is that the document? (Showing witness paper.)

A. I should presume that was a copy of the certificate I issued. That is not my signature.

Q. Did you go on to this boat and inspect her?

A. Yes, sir.

66 Q. Did you examine her boiler?

A. Yes, sir.

Q. What kind of boiler-plate was that?

A. Iron.

Q. What name had it on?

A. I don't remember positively.

Q. Did it have any name on?

A. I say I don't remember.

Q. Was it your duty to give an inspection certificate to any vessel that had not the maker's name on the boiler?

A. It is customary where the boilers have been used for some time and covered up with brick-work, to regard them as having complied with the act, if the inspector is satisfied with the strength of the boiler.

Q. Where do you get that authority from?

A. That necessarily follows from the circumstances connected with the use of the boiler, because the stamps in the course of time are often obliterated.

Q. Do you take into consideration those stamps at all?

A. I always do in new boilers.

Q. Do you in old boilers?

A. I seldom find any stamps on them. I regard them as having complied with the rules, because the law makes it a penalty to manu-
67 facture boilers without being stamped.

Q. Did the law of 1852 make it obligatory upon you to put a safety-valve into a steamer?

A. The law of 1852 made it discretionary.

Q. Did you require it of them?

A. Yes, sir.

Q. What did they say?

A. They said they could not get any there, and requested me to send for one.

Q. Didn't they tell you they had a lock safety-valve on hand?

A. No, sir.

Q. Did you have an interest in the sale of these safety-valves?

A. No, sir; I never was so interested, directly or indirectly.

Q. Didn't you get twenty dollars for every one you sold?

A. I had no interest in their sale pecuniarily or in any other way.

Q. Didn't you get twenty dollars for every one you sold?

A. No, sir.

Q. Have you never told men so?

A. No; I never did.

Q. Didn't you send a lock safety-valve to the steamer Montello and didn't you tell the owners of the Montello if they would return
68 the safety-valve and pay the express charges, it would be all right.

A. I don't remember that.

Q. Didn't you say the charges were about five dollars?

A. I didn't know what they were.

Q. Didn't you say, if they would pay one-half the expenses, it would be all right?

A. No, sir; I didn't.

Q. Now, how about these steam-cocks?

A. There was no steam-cocks required.

Q. Why is it charged in this libel?

A. I think the steam-cock and a water-guage are two different kinds of machinery.

Q. Well—water-guage—how many water-guages had they on the boat?

A. None at all.

Q. What kind was prescribed by the law?

A. It didn't prescribe any particular kind of water-guage—one that was good & workable, and reliable.

Q. Do you mean a floating water-guage?

A. No, sir.

Q. What kind do you mean?

A. A glass water-guage.

Q. Is that reliable?

A. It is regarded as sufficiently so, so that the majority of men use them.

Q. Do steamboat-men rely upon a glass water-guage?

69 A. Some of them do a great deal—sometimes too much. The try-cocks are the best.

Q. What is the object of having a water-guage?

A. The object is to comply with the law requiring it.

Q. Isn't it just as well to have steam-cocks as a water-guage?

A. That is matter of opinion. Some men rely on steam-cocks instead of a water-guage. Some engineers would not run without a glass water-guage.

Q. Are you acquainted with these Fox Rivers?

A. Yes, sir.

Q. Have you ever run on those boats as engineer or anything?

A. Yes, sir.

Q. Were any boats ever enrolled or licensed up there?

A. Yes, sir.

Q. Any that ran exclusively on the Fox River?

A. No, sir; I don't think there was—not any that ran on Fox River—not to my knowledge.

Q. How many are there running on Fox River now?

A. Between twenty and thirty. I can't distinctly remember. I think certainly twenty; may be more. I think there is not less than twenty.

Redirect examination:

Q. I understand you to say squarely and fully that you had no direct or indirect earthly interest in the sale of these articles?

70 A. Yes, sir; neither in the water-guage nor in the safety-valve. I never had any interest, directly or indirectly, in any machinery used on steamboats.

Judge HUBBELL, *District-Att'y*:

Your honor: I wish farther to offer all the laws of the State of Wisconsin and the United States, commencing with the act of 1846, making appropriations of lands for the improvement of the Fox River, &c.

The COURT. You may do that at any time. A simple reference to them will be sufficient.

Pl'ff (libellant) rests.

DEFENDANT'S TESTIMONY.

Testimony of N. M. Edwards.

NATHANIEL M. EDWARDS, a witness for the claimants, being sworn, testified as follows:

Q. What is your business?

A. Civil engineer.

Q. What capacity do you now occupy in the Mississippi and Fox River Improvement Company?

A. Superintendent of engineers at Green Bay.

Q. Are you acquainted with the Mississippi and Green Bay Canal?

71 A. I have had about five and one-half years acquaintance with it.

Q. Have you ever been over it?

A. Yes, sir.

Q. Do you know the falls?

A. Yes, sir.

Q. What is the fall at De Pere?

A. It is from seven to nine feet.

Q. What improvements are at De Pere?

A. Lock, and dam, and water-power.

Q. What is the length of the canal at De Pere?

A. It is a very short piece. There is a small basin covering about an acre or two, and there is a small canal. The whole length may be 400 feet.

Q. What is the probable height of the dam?

A. From the roof to the bottom I should say about 10 to 11 feet.

Q. What was that dam made for?

A. For water-power. I could not say; it was built before my time. I suppose for water-power, and partially for navigation.

Q. Take the stream right along, and describe the improvements.

A. The next place is Little Kakano, or Little Kakalin. There is a fall there of about eight feet, about five or six miles above De Pere.

The dam is about 600 feet long, built there in deep water—not on
72 rock, but on soft foundation. And the height of the dam is about 14 or 15 feet from the bottom to the top. The lift there is about eight feet.

Q. How many locks?

A. One lock, and the canal is about 600 or 700 feet long. At the next rapids, at De Croche, there is a dam and lock, some six miles above there. The dam there is about 600 feet, and the lock has a lift of about eight or nine feet. The canal is about 800 feet long. There is a stone lock built in place of another one, which was situated on the other side of the river, originally. The next rapid is grand Kakalin. In all, there is a fall in that rapid of about 50 feet. There are five locks. The rapids are about a mile long. There are five locks varying from 9 to 12 feet.

Q. How long is the canal?

A. About a mile.

Q. What is the next?

A. Little Chute. There are four locks in that canal; one combined lock, which is in place of two locks. At the foot of the canal, and about a mile above this, there are two more locks. That is four locks altogether.

Q. What is the fall?

A. The fall is 38 feet. The dam here is between 600 and 700
73 feet long. The rapids are not quite a mile in length. The next canal and dam are at the cedars. It is lock, with about nine feet lift. The canal is only between one and two hundred feet long above the lock. There is also an entrance below the lock which is 200 feet long, and might be called a part of it.

Q. How great is the fall?

A. Nine feet.

Q. What is the next?

A. The next rapid is at Appleton, or the Grand Chute. There are two dams built upon this rapid—about a mile. The lower dam has in connection with it one lock of about nine-feet lift. The canal is about 700 feet in length. The upper dam, built nearly at the upper end of the rapids, has in connection with it a canal of about a half mile in length, and three locks. The lift is, on an average, about 10 feet for each lock, making, in all, nearly from 39 to 40 feet fall for the whole rapids at Grand Chute.

Q. Is there any breakwater there?

A. There is a pier, a crib-work filled with stone, running up the river, connecting with the end of the dam, and from that running down to the upper lock, some 600 or 700 feet long, which divides the basin
74 from the bed of the river, making a basin some 12 feet high at the upper end, and 18 feet at the lower end, higher than the river at this time.

COURT. Q. Is that for water-power?

A. It creates a heavy water-power, but it was necessary for navigation to build that pier. There is about 12 feet head of water at the upper end, about 22 feet at the lower end, and it is 700 feet long. It is built up in the channel of the old river.

Q. What is the width of the crib?

A. 14 feet on the top, about 17 or 18 feet at the base.

Q. What is it filled with?

A. Stone.

Q. Hewed timber about it?

A. Yes, sir. The next rapid is at the foot of Lake Winnebago. There

are two outlets to the lake. The north channel is the one used at present, through Menasha. The canal is nearly a mile long. The lift of the lock is about eight feet; at times a little more or less, according to the state of the water.

Q. How high is the fall there?

A. Sometimes it might be eight feet, sometimes nine or ten feet. The next dam and lock is at Montello, about 95 miles above Menasha.

75 The river is much narrower there. The dam is only about 200 feet wide. The lock has a lift now of about two feet. This lock is at the foot of Lake Buffalo.

Q. Describe that.

A. Originally there was very little fall there, merely a sand-bar; but the dam being built raised the water perhaps a foot, and by dredging below it has lowered the bed of the river, so that there is now about two-feet lift, sometimes less, according to the stage of the water. The next lock is at Governor's Bend, about 25 or 26 miles above Montello, about 4 miles below Fort Winnebago. This dam is only about 160 feet wide. The lock has a lift of from 3 to 4 feet. The canal is short. The river at that part is greatly canaled now. Most of it is artificial work, which does not follow the old river all the time. But it keeps the general direction of the old river, making straight lines or curves where there were originally sharp angles. For the last six or eight miles coming to Fort Winnebago it might be called almost all canal work, nearly all dredged. The next lock is at or near Fort Winnebago, at the foot of

76 the canal connecting the Fox & Wisconsin Rivers. The lift of that lock varies from 5 to 7 feet, and 5 to 8 feet, according to the state of the water in the Fox & Wisconsin Rivers. The canal between the Fox & WisconsinRivers is a little over two miles in length. At the upper end of the canal is a lock, which we call the guard-lock. At a low state of the Wisconsin River that is thrown open, and in a high state of the Wisconsin River it must be used as a lock to keep the canal from overflowing.

Q. What is the nature of the land above the canal?

A. It is, next to the Wisconsin River, very sandy—clear sand; but on the end next the Fox River it is a marshy soil, a mixture of sand & muck.

Q. You are superintendent of that canal—chief engineer?

A. Yes, sir.

Q. Have you been engaged in engineering before your connection with this canal?

A. Yes, sir.

Q. What is that water from Portage to Green Bay?

A. From Fort Winnebago to Green Bay it is called the Fox River. It used to be called Neenah River, I believe. Now it is a river improvement, I should call it.

Q. Is it a canal?

A. I should hardly call it a canal.

Q. Did you draw that map? (Showing witness map.)

77 A. I drew the original, of which that is a copy.

Q. Is that correct?

A. Yes, sir; it is correct to the best of my knowledge, according to the information I got from various official sources.

(Map offered in evidence. Admitted so far as it is applicable. Annexed hereto, and marked Exhibit A.)

Testimony of Finley F. Hamilton.

FINLEY F. HAMILTON, a witness for the claimant, being sworn, testified:

Q. Where do you reside?
A. Oshkosh.
Q. Are you acquainted with the Fox River?
A. Yes, sir.
Q. When did you come to Green Bay first?
A. In 1830.
Q. Is there a dam built across the river at De Pere?
A. Not at that time.
Q. Was there subsequently?
A. Yes, sir; in 1835 & 1836.
Q. By whom was it built?
A. By an incorporated company—a private company.
Q. Was that built across the river?
A. Yes, sir.

Q. How high is that dam?

78 A. It was about 6 feet lift, 6 or 7 feet the original dam.

Q. Did a steamboat ever come up that river before the improvement was made?

A. There were steamboats came as far as De Pere. That was the head of navigation.

Q. Do you know of an attempt being made to get steamboats up the river farther than that?

A. No, sir; not until that dam was built. None run up the river until after the improvements.

Q. Do you know anything about the Black Hawk?

A. I was away when she came there. I think she was built at Buffalo, and brought to the bay. But it was a failure. They made an attempt to get it through. They got it as far as the Kakalin Rapids, and they tried then all one season to make it go farther, and then abandoned it, taking the machinery down to Oshkosh.

Q. Have you ever resided at Oshkosh before?
A. Yes, sir. I was there previously to 1840.
Q. Did you do business in Oshkosh?
A. Yes, sir.
Q. And in Berlin?
A. Yes, sir.

Q. How about the commerce on the river at that time?

79 A. Until the improvement was made up as far as the Kakalin, and the plank-road to Menasha, we didn't pretend to ship anything down in that direction.

Q. What kind of business were you in?
A. Produce trade, buying and shipping grain.
Q. How did they get their freights south from Oshkosh & Berlin?
A. All the merchandise was bought at Milwaukee.
Q. How was it brought up?
A. By teams from there to Oshkosh.
Q. Was there any produce of any consequence brought up the river from Green Bay to Oshkosh?

A. No, sir; I think not. I moved my goods when I came to Oshkosh all the way by wagon. I found a road there by the lake, and I went to the outlet of the river at the island. I forded the river there at the head of the rapids, and I crossed over on the Neenah side.

Cross-examination:

Q. What weight of goods did you move up?

A. Two or three teams could carry it—merchandise & household goods.

Q. Don't you know that the goods for the Indian payments and for the fur company establishments were carried up in boats, from time to time, in 1830?

80 A. Yes, sir. I have been up with batteaux, barges, canoes——

Q. Do you know of logs or timber being floated down the river?

A. No, sir.

Q. Was there any difficulty in floating them if they had wanted to?

A. Yes, sir. You could not get them over the rapids.

Q. Couldn't you get logs over?

A. No, sir; there was too many rocks. There was no occasion to float logs down that way. There was not much pine-timber up that way until you got to Wolf River.

Q. You heard the testimony of Mr. Whitney and Mr. Goodell about the mode of going up in barges. Was that the way you went up?

A. A good deal so. In getting boats over the rapids I found it necessary to put the men into the water. They were not poled up or oared up, but dragged up; and it required a particular stage of the water. If the current was too strong or too low we had to pick our way out, move stones sometimes, & make artificial channels.

NATHANIEL M. EDWARDS, recalled, testified:

Q. Can a boat go up and down that stream without going through the canal?

A. No, sir.

81 Cross-examination:

Q. What do you call the company that employs you?

A. Green Bay & Mississippi Canal Company.

Q. How long has that company been in existence?

A. I think the articles of partnership were signed in the summer of 1866.

Q. They were the successors of some company, were they not?

A. Yes, the Fox & Wisconsin Improvement Company.

Redirect examination:

Q. That Mississippi and Green Bay Company are a private association?

A. Yes, sir.

Q. Do they have control over the canal now?

A. They do.

Q. Was it granted to them by the State?

A. It was sold out by the trustees of the old improvement company, and they purchased it at public sale.

Q. Does a boat pass through those locks have to pay toll?

A. Yes, sir.

Q. All of them?

A. Yes, sir.

Q. Could a boat pass through, except a United States boat, without paying toll?

A. No, sir; they never intend to have any. It is the rules of the company to charge every boat.

82 DIST. ATT'Y. Q. Was that the rule also under the Fox & Wisconsin River Improvement Company?

A. I understand so, but I was not here when it was operated by that company.

THOMAS L. HUMES, recalled, testified:

Q. What is the ton'age of the steamer Montello?
A. I think about 50 tons. I can't say definitely.
Q. This paper says 50 tons?
A. I think she was just about 50 tons burden.

Defendant's counsel then put in evidence a report of Lieutenant Cram of the survey during 1839 & 1840, entitled—

"A report from the Secretary of War transmitting, in compliance with the resolution of the Senate, copies of reports, plans, & estimates for the improvement of the Neenah, Wisconsin, & Fox rivers, and the improvement of the haven of Rock River, and the construction of a pier at the northern extremity of Winnebago Lake, March 25, 1839. Read March 26, 1840.

THOMAS L. HUMES, recalled for the libellant, testified as follows:

Q. Is there a light-house of the United States on the Fox River or adjacent to it on Lake Winnebago?
A. Yes, sir.
83 Q. Whereabouts?
A. It is near the north end of Lake Winnebago, a short distance from the mouth of the river. It is nearer to the outlet of the lake that now forms the canal, that leads to the lock at Menasha.

Cross-examination:

Q. How do you know that light-house was built by the Government?
A. I didn't say it was built by the Government, I said there was a light-house there.
Q. Has that been used as a light-house?
A. Not recently.
Q. How recently?
A. Not to my knowledge since I first saw it. It had been built some time before I saw it.
Q. When did you see it?
A. I think in the fall of 1860, or in the summer of 1861. It has not been used for about ten years past.
Q. You never saw it used?
A. No, sir.
Testimony closed.

84 And now at this same term, to wit, January term, A. D. 1872, and on the seventeenth day thereof, to wit, on the fifth (5th) day of February, A. D. 1872, present the Hon. Andrew G. Miller, district judge, presiding, the following proceedings were had, to wit:

Decree.

THE UNITED STATES OF AMERICA
vs.
THE STEAMER MONTELLO, HER BOATS, &C.—Stephen M. Booth & Charles W. Slayton, claimants.
} Appeal in admiralty.

This day came the district attorney and the claimants by their counsel Mr. Hauser, and on consideration of the pleadings and proofs, and of

the arguments of counsel thereon, it is ordered, adjudged and decreed by the court that the libel of information, and the amended libels of information, be, and hereby are, dismissed.

A. G. MILLER.

And same day came the district attorney and prayed an appeal to the Supreme Court of the United States. Whereupon it is ordered by the court that said appeal be, and hereby is, allowed, and a citation issued.

(Here follows map marked page 84½.)

85 *Opinion.*

Fox River above De Pere Rapids is not a public navigable water of the United States, within the admiralty jurisdiction.

THE UNITED STATES
vs.
THE STEAMER MONTELLO.

In the circuit court of the United States for the eastern district of Wisconsin.

MILLER, *District Judge:*

This steamer was seized by the collector of customs, as alleged in the libel of information, for carrying and transporting passengers on the navigable waters of the United States, the hull of said steamer not having been inspected, pursuant to the provisions of the acts of Congress, at any time within twelve months, and a penalty of five hundred dollars is claimed.

Exceptions to the libel of information being filed for insufficiency, and also want of jurisdiction of the court, an amended libel was brought. The amended libel charges that the steamer was seized by the collector while lying at Eureka, on waters navigable from the sea, for transporting goods and passengers on Fox River, between Oshkosh and Portage City. The cargo's transported consisted, in part, of products of the State of Wisconsin, destined for use and consumption in other States of the United States and foreign countries; and also, for carrying products of other States and countries to points and places within this State, without having complied with the conditions of an act of Congress, approved July 7, 1838, entitled "An act to provide for the
86 better security of the lives of passengers on board of vessels propelled in whole or in part by steam;" and, also, with the terms of an act entitled "An act to amend an act, entitled 'An act to provide for the better security of the lives of passengers on board of vessels propelled in whole or in part by steam,'" approved August 30, 1852, in this, that the steamer had not been enrolled and licensed; and a penalty of $500 is claimed.

The second count claims a penalty of $500 against the steamer for being navigated on Fox River, with passengers on board, between Oshkosh and Portage City, without an additional safety-valve placed on the boilers as provided by law, and without a good reliable water-gauge, contrary to the statutes of the United States.

Exceptions to the amended libel were filed by the claimants, alleging want of jurisdiction in the court; that the Fox River was a stream

entirely within this State, and not navigable so as to bring it within the scope and intention of the acts of Congress and for insufficency in the amended libel.

On consideration of these exceptions the district court dismissed the libel of information, and on appeal, the decree of the district court was affirmed by the circuit court.

An appeal was taken by the United States to the Supreme Court, and at the last term of that court, the case being argued by the Attorney-General, no counsel appearing for the claimants, the court, in the
87 opinion, remarked: "We are supposed to know, judicially, the principal features of the geography of our country, and as a part of it, what streams are public navigable waters of the United States. Since this case was presented we have examined, with some care, such geographies and histories of Wisconsin as we could obtain from the library of Congress, to ascertain, if possible, the real character of Fox River, and to render the fiction of the law, as to our supposed knowledge of the navigable streams in that State, a reality in this case; but, from such examination, we are still in doubt whether Fox River has any such connection with other waters as to form with them a continual highway, over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water." (11 Wallace, 411, 414.)

The Supreme Court did not decide the questions raised by the exceptions, but "directed the cause to be remanded to this court for further proceedings, when the parties will be able to present, by new allegations and evidence, the precise character of Fox River as a navigable stream, and not leave the matter to be inferred by construction from an imperfect pleading."

Pursuant to this mandate the district-attorney brought an amended libel of information alleging that Fox River is a navigable stream
88 of water running from Portage City by Eureka, in the State of Wisconsin, into and through Lake Winnebago, and thence into and through Green Bay into Lake Michigan, and thus forming a continuous line of water from Portage City to Lake Michigan for two hundred and forty miles, and thence to the sea, and being all the way navigable for vessels measuring from 20 to 200 tons burthen; and two penalties of five hundred dollars are demanded for the neglect of enrolment and license, and for not having the required water-guage and safety-valve.

The claimants answer this last-amended libel of information, and allege that Fox River does not run to Portage City, but is connected with said city by a canal supplied with water from Wisconsin River; that Fox River is not and never was a navigable stream of the United States. Prior to the year 1846 Fox River was not navigable for any kind of boats by reason of shallowness of water, and numerous rapids and abrupt falls.

It is further pleaded in the answer that, by an act of Congress, approved August 8, 1846, entitled "An act to grant a certain quantity of land to aid in the improvement of the Fox and Wisconsin Rivers, and to connect the same by a canal, in the Territory of Wisconsin," was ceded and granted to the Territory (now State) of Wisconsin ex-
89 clusive control of said Fox River, reserving only that it should be a public highway, for the use of the Government of the United States, free from any toll or charges whatever for the transportation of the mails, or for any property of the United States, or persons in their service, passing up or along the same. And that the State of Wiscon-

sin, by an act of the legislature, approved July 6, 1853, entitled "An act to incorporate an association for the improvement of the Fox and Wisconsin Rivers," ceded and granted to the Fox and Wisconsin Rivers Improvement Company all the rights and privileges which the State had obtained from the United States. The Fox and Wisconsin Rivers Improvement Company, pursuant to the power and authority granted by the State, did build divers dams, locks, and canals in Fox River, from Portage City to Green Bay, and no boat of any size or description can navigate said River without passing through said locks and canals. And that Fox River is a canal or slack-water navigation, and boats navigating the same are not within the admiralty and maritime jurisdiction of the United States. And the canals, or slack-water improvement and the locks, and the entire control of the navigation of said river, belong to the Green Bay and Mississippi Canal Company; & the
90 boats navigating the river and passing through the locks and canals have to pay toll to the said company, which the steamer Montello before her seizure did pay.

The case coming on to be heard, the court, in favor to the parties, took the testimony, the substance of which is as follows:

Goods and provisions were carried up the river in its natural state from Green Bay to Fort Winnebago, in Durham boats. The cargoes were products of other States and countries, and sometimes furs were brought down the river from Fort Winnebago. The first obstruction was the rapids at De Pere, five miles above the mouth of the river. There were several rapids and falls between De Pere and the outlet of Lake Winnebago, where the Durham boats had either to be lightened or to be entirely unloaded, and the cargoes carried by land to places above. The Cedar Rapids were passed with empty boats by men wading alongside pushing. At the Grand Chute the boats were unloaded and men had to lift them over the rock and reload above. That was a solid rock, making a fall of about two and one-half feet perpendicular. At the Winnebago Rapids, the outlet of Lake Winnebago, they could pass up with a portion of a cargo, taking up the whole cargo in two or three trips. From Winnebago Rapids, through Lake Winnebago to
91 Oshkosh, is about twelve miles. The width of the river at its mouth is about a quarter of a mile, and its general width was about two-thirds of that. No steamboat of any size could navigate the river between De Pere Rapids and Portage City. At Oshkosh, the Upper Fox flows into the lake. About thirty-five or forty miles above that point the river is very narrow and the water is very shoal. There was difficulty in passing Durham boats at Buffalo Lake. This was about forty miles below Fort Winnebago. They had difficulty in pushing through the mud and over sand-bars, which obstructed the navigation. There was very little trade on the river before the year 1845. The greater part of the trade was in carrying up supplies to Fort Winnebago, and to Indian payments. Before the canals there was no way of navigation, but on the river. Durham boats drew from two to two and one-half feet of water when loaded, and are from seventy to one hundred feet in length, with twelve feet beam. Portage City is on the Wisconsin River, a mile and a half from Fox River, and there was no water communication between the two rivers until a canal was built. The canal is supplied with water from Wisconsin River. Since the improvement of the river, several steamboats have been run on the
92 river, measuring from sixty to one hundred and fifty tons. There was a large trade on the river by Durham boats from the year 1847 to 1850.

The fall at De Pere is from seven to nine feet. The improvement at that point is a dam ten or eleven feet high, and a canal-approach four hundred feet long. About five miles above De Pere, there is a fall of eight feet. The height of the dam is about fourteen feet. The lift of the lock is eight feet. The canal is 600 feet long. The next rapids are about six miles further up stream, where the lift of the lock is eight or nine feet, and the canal is eight hundred feet long. At Grand Kaukalin there is a fall of fifty feet with five locks, varying from nine to 12 feet. The rapids are a mile long, which is the length of the canal. At Little Chute there are four locks in that canal. The fall is thirty-five feet. At Cedar Rapids there is a lock with nine feet lift, and the canal above the lock is between one and two hundred feet long; and below the lock, two hundred feet long. The fall at that point is nine feet. At Appleton, or the Grand Chute, there are two dams. The lower dam has, in connection with it, one lock of nine feet lift, with a canal seven hundred feet in length. The upper dam has, in connection with it, a canal
93 of about half a mile in length, and three locks, at a lift of ten feet for each lock. The whole rapids at this point are of forty feet fall. The next rapids are at the outlet of Lake Winnebago. The lift of the lock is eight feet, and the canal about a mile in length. At Montello, above Oshkosh, there is a dam and lock—about two feet lift. The river above Lake Winnebago is much narrower than below. The next lock is above twenty-five miles above Montello, and four miles below Fort Winnebago—a lift of three to four feet. The canal-approach is short. The river at that part is greatly canalled. Most of it is artificial work, which does not follow the old river bed all the time, but it keeps its general direction, making straight lines or curves where there were sharp angles. For the last six or eight miles below Fort Winnebago, it might be called almost all canal work—nearly all dredged. The next lock is at Fort Winnebago, at the foot of the canal connecting the two rivers. Its lift is five to seven feet. The canal is a little over two miles in length. At the upper end of the canal is a lock, called the guard lock. At a low state of the Wisconsin River that lock is thrown open, and in a high state of water it must be used as a lock to keep the canal from overflowing. A boat cannot pass up and down the
94 river without going through the canals. Boats passing through the locks must pay toll to the company. The ton'age of the steamer Montello is about fifty tons. Portage City is situate near the upper end of the canal on Wisconsin River.

There not being obstructions in Fox River, below De Pere Rapids, to steamboats and vessels used in navigating Lake Michigan and Green Bay, the bay and the river to that point may be considered as a continued arm of the lake; and, over that portion of the river, the United States courts have jurisdiction to enforce the marine laws, and to compel obedience to acts of Congress, passed pursuant to the constitutional power "to regulate commerce with foreign nations and among the several States."

The question is as to the navigable character and capacity of Fox River above De Pere Rapids. Rivers in the United States "are regarded as public navigable rivers when they are navigable, in fact, and they are navigable in fact when they are used, or are susceptible of being used in their ordinary condition as highways for commerce, on which trade and travel are, or may be, conducted in the customary mode of trade and travel on water." (The Daniel Ball, 10 Wallace, 557.) And a river is a navigable water of the United States when it forms by itself, or by its connec-
95 tion with other waters, a continued highway over which commerce

is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water. (The Montello, 11 Wallace, 411.)

Products of foreign countries or of States of the Union having been carried up the river in Durham boats, or down the river, destined for foreign countries, or for other States under the difficulties of navigation proven by the witnesses, cannot be characterized as commerce.

Commerce in the sense of the Constitution, is the intercourse of nations and States in each other's produce and manufacture, in which the superfluities of one are given for those of another, and then re-exchanged with other nations or States for mutual wants. There is a distinction between commerce and trade; the former relates to our dealings with other nations and States, the latter to mutual dealings at home. The trade on Fox River by Durham boats in no manner affected other States or countries. The river above De Pere Rapids did not form a continued highway, over which commerce was carried on with other States and countries, in the customary modes in which commerce was conducted by water. The trade was purely internal, and very imperfect and
96 limited; the river not admitting of anything more than an imperfect navigation.

The act of Congress referred to in the answer, 9 U. S. Statutes, 83, granted to the State of Wisconsin on its admission into the Union, for the purpose of improving the navigation of the Fox and Wisconsin rivers, and for constructing a canal to unite the said rivers at or near the Portage, a quantity of land equal to one-half of three sections in width on each side of said Fox River, and the lakes through which it passes, &c. The said rivers when improved and the said canal when finished, shall be and forever remain a public highway, for the use of the Government of the United States, free from any toll or other charge whatever for the transportation of the mails, or for any property of the United States, or persons in their service, passing upon or along the same. As soon as the Territory of Wisconsin shall be admitted into the Union, all the lands granted by this act shall be and become the property of said State for the purposes of the act and no other, with power to the legislature of the State to adopt such kind and plan of improvement on the route as the legislature shall from time to time determine for the best interest of the State.

97 This grant to the State of Wisconsin is absolute, upon the only condition of free transportation of the mails and property of the United States, and persons in their service. It vests in the State unrestricted power to adopt such kind and plan of improvement on the route as the legislature shall from time to time determine for the best interest of the State.

The State of Wisconsin accepted the grant, and, pursuant to the authority and power vested in the State, a company was incorporated by an act approved July 6, 1853, for the improvement of the Fox and Wisconsin Rivers. That act vested in the corporation all the rights and privileges granted to the State by the act of Congress. And the improvement company, in carrying out the object of its creation, built dams, locks, and canals in Fox River from Portage City to De Pere Rapids. By the work of this company, Fox River was changed from its natural condition to an artificial thoroughfare, for the use of which all boats were required to pay toll. It became the property of and was exclusively managed by a corporate body, with power to demand and receive tolls from all crafts passing through the locks, not excepting boats enrolled and licensed for coasting trade. So far as the United States Govern-

98 ment is concerned the canal and slack-water improvement of Fox River is to be viewed in the same light as similar improvements of rivers in other States. This case is similar in principle to Veazie vs. Wyman, (14 Howard, 568.) The river Penobscot is entirely within the State of Maine, as Fox River is within this State. Between the city of Bangor and Oldtown, a distance of eight miles, the Penobscot passes over a fall, is crossed by four dams erected for manufacturing purposes, and for the above space is not navigable. The legislature of Maine, by an act empowered certain persons to improve the navigation of the river above Oldtown, and authorized them to deepen the channel of the river, to remove gravel, bars, rocks, and other obstructions in the bed of the river, and to erect dams, locks, canals, &c., and conferred on those persons the sole right of navigating the river so improved. The plaintiffs in error placed on the improved part of the river a steamboat, which was enrolled and licensed for the coasting trade at the custom-house in Bangor, and claiming the right to run their boat. The court of the State of Maine enjoined them from so running their boat, and they removed the case by writ of error to the Supreme Court of the United States. It
99 was there decided that the law of the State granting the exclusive navigation of the river to a company created for the purpose of improving it, is not in conflict with the eighth section of the first article of the Constitution of the United States, which gives power to Congress to regulate commerce with foreign nations and among the several States; and a license to carry on the coasting-trade did not entitle a vessel to navigate the upper waters of the river so improved.

I pronounce that Fox River, between Oshkosh and Portage City, the points between which the Montello is alleged in the libel of information to have been navigated, is not a public navigable water of the United States, and that the owners of said steamer were not under lawful obligation to have her enrolled and licensed for the coasting-trade, nor to have her inspected in compliance with the act of Congress providing for the safety of passengers on board of vessels propelled by steam.

It is therefore ordered that the libel of information be dismissed.

100 UNITED STATES OF AMERICA,
Eastern District of Wisconsin, ss:

I, Edward Kurtz, clerk of the circuit court of the United States of America for the eastern district of Wisconsin, do hereby certify that I have compared the writings annexed to this certificate, and they are true copies of their respective originals, and are correct transcripts therefrom, now on file and remaining of record in my office, being a full and complete copy of the record and proceedings in the suit of The United States against The Steamer Montello, her boats, &c., except that the map in said record is the original map introduced at the hearing.

In testimony whereof I have hereunto set my hand and duly affixed the seal of the said court, at the city of Milwaukee, in said eastern district of Wisconsin, this twenty-sixth day of September, in the year of our Lord, one thousand eight hundred and seventy-two, and of the Independence of the said United States the ninety-seventh.

[SEAL.] EDWARD KURTZ, *Clerk.*

101 The United States of America to Stephen M. Booth and Charles W. Slayton, claimants of the steamer Montello, her boats, &c., greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the first Monday of December next, pursuant to an appeal in the circuit court of the United States for the eastern district of Wisconsin, wherein The United States of America is appellant, and you are appellees, to show cause, if any there be, why the decree passed against The said United States of America should not be reversed, and speedy justice should not be done to the parties in that behalf.

Witness the honorable Salmon P. Chase, Chief Justice of the said Supreme Court of the United States, this fifth day of December, in the year of our Lord one thousand eight hundred and seventy-two, and of our Independence the ninety-sixth.

A. G. MILLER,
District Judge.

We admit service of above citation this 7th day of May, A. D. 1872.
HAUSER & COLMAN,
Proctors for Claimants.

(Indorsement on cover:) No. 432. The United States, appellants, vs. The Steamer Montello, &c.—Stephen M. Booth & Charles W. Slayton, claimants. E. Wisconsin C. C. W. S. Filed 7th October, 1872.

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CONDITION OF ORIGINAL

In the Supreme Court of the United States.

OCTOBER TERM, 1873.

THE UNITED STATES, *Appellants*,
vs.
THE STEAMER MONTELLO, &c. } No. 210.

Appeal from the Circuit Court of the United States for the Eastern District of Wisconsin.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1873.

THE UNITED STATES, *Appellants*,
vs.
THE STEAMER MONTELLO, &c. } No. 216.

Appeal from the Circuit Court of the United States for the Eastern District of Wisconsin.

BRIEF FOR THE UNITED STATES.

This case was before the court at December term, 1870, and is reported in 11 Wallace, 411. It is a libel of information to recover certain penalties alleged to have been forfeited to the United States, and turns upon the question of whether the Fox river in Wisconsin, between Oshkosh and Portage City, forms, by itself or by its connection with other waters, part of the navigable waters of the United States within the doctrine laid down by this court in the case of the Daniel Ball, 10 Wallace, 597.

The facts in respect of the navigability of the Fox river are stated in the opinion of the district judge below, (Rec., pp. 43, 44,) from which it appears that the Fox river has been rendered navigable and been connected with other navigable waters by means of canals and locks, which are provided for by Congress in the act of 1846, ch. 170, (9 U. S. Stat., 83.)

The Government submits the case upon the record without argument.

GEO. H. WILLIAMS,
Attorney General.

C. H. HILL,
Assistant Attorney General.

Supreme Court of the United States.

OCTOBER TERM, 1874.

NO.

THE UNITED STATES OF AMERICA,

Appellant.

vs.

THE STEAMER MONTELLO, &C.,
STEPHEN M. BOOTH & CHARLES W. SLAYTON,

Claimants.

BRIEF OF CLAIMANTS.

HAUSER & COLMAN,
Attorneys.

J. H. HAUSER, OF COUNSEL.

REPORTER PRESSES, Fond du Lac, Wis.

Supreme Court of the United States.

OCTOBER TERM, 1874.

NO.

THE UNITED STATES OF AMERICA,

Appellant.

vs.

THE STEAMER MONTELLO, &C.,
STEPHEN M. BOOTH & CHARLES W. SLAYTON,

Claimants.

Appeal from the United States Circuit Court for the Eastern District of Wisconsin.

ARGUMENT.

I.

This case was argued in this Court in March 1874.

The claimants brief contained a full abstract of the facts to which reference is here made.

The Court assigned no reason for a reargument but we presume it was to more fully consider the question; Whether the Fox River between Portage City and Oshkosh in the State of Wisconsin is a "navigable stream" of the United States so as to bring it within the admiralty and maritime jurisdiction of the Federal Courts.

The first definition given by this Court of what is meant by "Navigable Waters of the United States" is in the case of The Daniel Ball, 10 Wal. 563. The Court says: "Those rivers must be regarded as public navigable rivers in law which are navigable in fact when they are used, or are susceptible of being used, in their ORDINARY CONDITION, as highways for commerce over which trade and travel are or may be conducted in the customary modes of travel on water." And in the present case, on a former appeal, the Court says: (11 Wal. 411,) speaking of the Fox River, it can only be deemed a navigable water of the United States when it forms by itself, or by its connections with other waters, as to form with them a continued highway over which commerce is or may be carried on with other States or foreign countries, in the customary modes in which such commerce is conducted by water.

If however the river is not itself a highway for commerce with other States or foreign countries, or does not form such highway by its connection with other waters, and is only navigable between different places within the State, then it is not a navigable water of the United States, but only a navigable water of the State, and the acts of Congress to which reference is made in the libel for the enrollment and license of vessels, have no application. These acts only require such enrollment and license for vessels employed upon the navigable waters of the United States."

II.

All the State Courts have discussed the question of nav-

igable waters but their definitions are purely local." In Maine any creek that is capable of floating logs is a navigable stream. If the Courts of that State did not so hold, the revenues of the State would be destroyed. The lumber from her immense forests could not be brought to market.

The legislature of Wisconsin, see Session Laws 1839 page 99, declared Rock River in Dodge County a public highway when it never has been navigable in fact, and the Supreme Court when speaking of this law says when the legislature therefore in the mill-dam law used the words "not navigable" they used them not in the common law sense, as including all rivers where the tide does not ebb and flow, but in the sense in which they have long been used in this country, as including only such as were not navigable, in fact, for any of the useful purposes of commerce, or such as had not been declared to be navigable or public highways by the law itself. It will be observed that there is no question here as to the effect of an act of the legislature declaring a stream navigable which is not so in fact as against the rights of the owner of the land over which it passes. It is simply a question as to what the legislature meant by the word "navigable."

Wood vs. Hasting, 17 Wis. 417.

Dixon, C. J. in Harrington vs. Edwards, 17 Wis. 586, uses these words: "The waters of the Fox River, a navigable stream at the city of Oshkosh," but in the case of *Morse et al vs. The Home Ins. Co.*, 30 Wis. 506, where the defense was that the boat being on "navigable waters" of the United States had not complied with the laws of congress for vessels engaged in navigating the public navigable waters of the United States. The same Judge says: "We have been favored with a newspaper copy of an able and elaborate opinion of the Circuit Court of the United States for the eastern

district of this State delivered by Miller, D. J., in the case of *The United States, vs. The Steamer Montello*, which fully examines and discusses the navigable character of these rivers at and between the places above referred to, and from a point far below Oshkosh on the Fox River. It was there held that the Fox River, and of course its tributaries above Depere Rapids is not a public navigable water of the United States within the admiralty jurisdiction." "Also says that the case of *Veazie vs. Wyman*, 14 How. 568, and the Daniel Ball, 10 Wal., 557, seem to be decisive of the principal of law involved as well as the former to touch very closely upon the facts here presented," and finally says: "We are quite content to abide the decision of the Circuit Court."

The State Courts have discussed the question of navigable waters only as a fact in their own State and not as relating to commerce with other States or Foreign Countries.

Even in this case in a former appeal, this Court said waters navigable only between different places within the State are not navigable waters of the United States, but only navigable waters of the State.

III.

Is the Fox River a navigable water of the United States?

The Fox River is known as the upper and lower Fox. The upper Fox runs from above Portage City to Oshkosh into Lake Winnebago. The lower Fox forms the outlet of Lake Winnebago and empties into Green Bay. There is no outlet for the upper Fox except the lower Fox. The testimony shows that the lower Fox was not a navigable stream prior to 1846. It had numerous rapids and abrupt falls. At Grand Chute there was a solid rock, making a fall of two and a a half feet perpendicular. No commerce could be carried up the river in the ordinary and customary man-

ner, and under no circumstances could it be claimed to be a public navigable stream prior to 1846. By an act of Congress, approved August 6, 1846, entitled "An act to grant a certain quantity of land to aid in the improvement of the Fox and Wisconsin Rivers, connecting the same by a canal, in the Territory of Wisconsin," exclusive control was granted to the State of Wisconsin, only reserving that it should be public highway for the use of the United States. The State of Wisconsin, by an act of the Legislature, approved July 6, 1853, entitled "An act to incorporate an association for the improvement of the Fox and Wisconsin rivers," ceded and granted all the rights and privileges which the State had obtained from the United States, to this company.

From 1840 to 1853 the control of the Fox River belonged to the State of Wisconsin, and since that it has belonged to the Fox and Wisconsin Rivers Improvement Company, and was not a public navigable water of the United States. And after this grant passed into the hands of the Improvement Company it became a canal or slack water navigation, and comes within the case of Veazie vs. Moor, 14 How. 568, which decides that the Penobscot river is not a public navigable river of the United States, for the reason that it has no navigable connection with the seas, unless made so by artificial or private means

The upper Fox has no navigable connection with the sea or lakes but which are made so by artificial or private means. Boats cannot pass up or down the river without passing through the canals and locks and paying toll. If the Fox River is a navigable stream of the United States, it would be impossible to conceive of any body of water that is not or might not become such navigable water.

IV.

In the ordinance of 1787, art. 4 for the government of

the Territory of the United States northwest of the river Ohio, Congress said "The navigable waters leading into the Mississippi and St. Lawrence and the carrying places between the same shall be common highways and forever free as well to the inhabitants of the said Territory as to the citizens of the United States, and those of any States that may be admitted into the Confederacy without any tax imposed or duty therefor"

Did Congress intend to include Fox river? Certainly not on the ground of navigability; for prior to the building of the canal and slack water navigation the testimony in this case shows only Durham boats could at certain stages of the water pass up and down the river and then only by unloading at certain places and lifting the boats over the rapids. See record pages 16 to 40. This Court says in the Daniel Ball, 10 Wal. 563, that it must be navigable in its "*ordinary condition*" and in this case 11 Wal. 411. "In the *customary modes* in which such commerce is conducted by water".

The testimony clearly shows that in its *ordinary condition* that it was impossible to get steamboats up or down the river, and that Durham boats could only pass up or down by being unloaded and lifted over the falls, and this could not be the "*customary modes*" by which commerce is conducted by water." The true definition of "navigable water" of the United States must be, which in its ordernary condition by itself or by its connections with other waters, forms with them a continual highway over which commerce is or may be carried on with other States or Foreign countries in vessels which Congress has deemed of suitable size to be recognized in its commercial and revenue laws, and not metaphysical navigability.

The literal construction of the ordinance of 1787 would include all the navigable waters in the State, for all

the lakes and rivers of the State empty either in the Mississippi or St. Lawrence. The Fox and Wisconsin rivers run within two miles of each other at Portage, Wisconsin, yet the former empties into the St. Lawrence, and the latter into the Mississippi. The four lakes at Madison are navigable and steamboats navigate them. These lakes empty through the Cat Fish Creek, and the Koshkonong marsh into the Rock river, and finally into the Mississippi. The Indians in their commerce carried their boats from lake to lake.

V.

Does the subsequent legeslature of Congress show that the waters of the Fox River was included in the ordinance of 1787. By an act approved August 6th, 1846, it granted exclusive control of the Fox River, to the State of Wisconsin, reserving only the free use of the river for the government of the United States, to carry its mails, property or persons in its employ.

Subsequently the State granted to companies the right to improve said river and to demand toll for all boats navigating the same, and property and persons carried on said river, except property, etc., of the United States.

If the ordinance of 1787, applied to Fox River then, all subsequent legislature of Congress and of the State of Wisconsin in regard to said river is in direct violation of said ordinance.

Again "common highway" as used in the ordinance of 1787, is used in a broader sense than admiralty jurisdiction, for while it includes navigable waters it also includes *carrying places* between the same, and admiralty jurisdiction has not yet extended to land as well as navigable water.

While the United States did grant land to aid in improvment of said river, yet the improvment was largely

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While the United States did grant land to aid in improvment of said river, yet the improvment was largely

made by private energy and sacrifice, and the government reserved no rights except as above stated.

VI.

The last question is;

If private enterprise should make waters navigable which were not before navigable, and capable of carrying vessels which are of sufficient capacity to come within the jurisdiction of the Federal Courts, which before were not navigable by any of the ordinary modes of commerce will the United States then come in and take jurisdiction and control, especially where this improvement is wholly within a State, and subject to State law and State taxation? Such a policy would not be for the best interest of the general and State governments, and would be such a centralization of power in the Federal government, and such an encroachment on the powers reserved to the States, by the Constitution, that this Court will be slow to make such a radical change and to extend the jurisdiction of the Federal Courts, that by the same reasoning the general government would take control of every trade, manufacture and enterprise throughout the country.

HAUSER & COLMAN, Attys.

J. H. HAUSER, OF COUNSEL.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1874.—No. 30.

THE UNITED STATES, APPELLANTS,

vs.

THE STEAMER MONTELLO, ETC., STEPHEN M. BOOTH AND ANOTHER, CLAIMANTS.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WISCONSIN.

ADDITIONAL BRIEF OF THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1874.

THE UNITED STATES, APPELLANTS,
vs.
THE STEAMER MONTELLO, &c., Stephen M. Booth and another, claimants. } No. 30.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WISCONSIN.

Additional brief of the United States.

In 1787 the territory west of the Mississippi belonged to France, but the United States owned the then unorganized territory northwest of the Ohio River, separated by the great lakes from the British territory on the north and by the Mississippi from the French territory on the west, and now forming the States of Ohio, Indiana, Illinois, Michigan, and Wisconsin.

An extensive trade was carried on across this territory by means of the rivers flowing north into the great lakes and south into the Mississippi and its tributaries, which rose in the centre of the territory, and often but a few miles apart, so that by carrying goods and canoes across the short intervening spaces known as portages, communication was kept up between the navigable waters to the north and to the south. Some of the rivers thus

used were very small and would only float canoes. The portages varied in width, but were seldom less than twenty miles. The shortest was the portage between the Fox River and the Wisconsin, which was about two miles. These two rivers formed one of the earliest and most important channels of communication across the territory, and this was the route by which, as early as 1673, Marquette proceeded from Canada to the Mississippi.

(Parkman's Discovery of the Great West, 52 *et seq.*;)
(3 Bancroft's History of the United States, 156, 157.)

By the ordinance of 1787, organizing the Northwest Territory, Congress enacted that "The navigable waters leading into the Mississippi and Saint Lawrence, and the carrying-places between the same, shall be common highways and forever free, as well to the inhabitants of the said Territory as to the citizens of the United States and those of any other States that may be admitted into the Confederacy, without any tax, impost, or duty therefor."

(Ordinance of 1787, article 4.)

By the statute of 1836, ch. 54, § 12, establishing the Territory of Wisconsin, the inhabitants are declared entitled to "All and singular the rights, privileges, and advantages," and "subject to all the conditions, restrictions, and prohibitions" contained in the ordinance of 1787.

(5 Statutes at Large, 15.)

By the statute of 1846, ch. 89, § 3, admitting Wisconsin as a State into the Union, it was enacted that the Mississippi and other rivers bordering on said State, "and

the navigable waters leading into the same, shall be common highways, and forever free, as well to the inhabitants of said State as to all other citizens of the United States, without any tax, duty, impost, or toll therefor."
(9 Statutes at Large, 57.)

By the act of 1846, ch. 170, (9 Stats., 83,) quoted on the brief filed in this case at the last term, (p. 5,) Congress granted a quantity of land to the State of Wisconsin, "For the purpose of improving the navigation of the Fox and Wisconsin Rivers."

Assuming that without special legislation the Fox River would not be part of the "public navigable waters of the United States," under the decisions of this court in the Daniel Ball, (10 Wallace, 557,) and the Montello, (11 ib., 441,) it is nevertheless contended that the above special legislation for the protection of the rivers and portages in the old Northwest Territory and Territory of Wisconsin makes it a navigable river within the act on which this information is founded.

G. H. WILLIAMS,
Attorney-General.

C. H. HILL,
Assistant Attorney-General.

20-445 Field

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~296.~~ 345

THE HOME INSURANCE COMPANY OF NEW YORK, PLAINTIFF IN ERROR,

vs.

JOHN F. MORSE AND CHARLES C. PAIGE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN.

FILED NOVEMBER 30, 1872.